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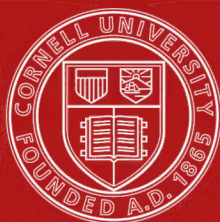
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A treatise on pleading and practice unde



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A TREATISE
ON
PLEADING AND PRACTICE

UNDER THE
CODE OF CIVIL PROCEDURE,

WITH
APPROPRIATE FORMS.

By SAMUEL MAXWELL.

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PREFACE.

The codes of the several states which have adopted the same agree in fundamental doctrines. In all the single "civil action" is the efficient means by which controversies are determined and judicial remedies applied. The abolition of the distinction between legal and equitable actions authorizes and requires the courts to adapt the relief to the matters in issue in each case, and thus avoid a multiplicity of suits and prevent a failure of justice.

There is but one form of action. The facts are to be stated in the petition, and if the party is entitled to the relief prayed for the court must grant it, whether it is sought at law or in equity. But this provision does not abolish the distinction which, from the nature of the case, distinguishes legal from equitable relief. In an action at law a party may still demand a jury, while in a purely equitable action it cannot be demanded as a matter of right, but the court may award issues to be tried to a jury. In order to save space and avoid repetition the prayer has been omitted from a number of forms of petitions in actions at law. The statute provides that the motion for the writ must be made upon affidavit—that is, the facts upon which the application is made must be sworn to positively. But the facts must be stated in a form to present an issue, as in case a peremptory writ is awarded upon the application, or on notice, or rule to show cause, the issue must be made upon the facts stated in the affidavit. The affidavit therefore must contain the facts required in a good petition, and a number of forms are given in one of the chapters on forms of petitions.

The author has endeavored to produce a clear, concise, and thoroughly practical work, in which all questions relating to pleading and practice ordinarily arising in the district and supreme courts are discussed and forms of procedure given. In the preparation of the forms the author has aimed to secure—first, sufficiency, second, directness and brevity. The amount of labor and care required in the preparation of a work of this kind can only be fully estimated by those having some experience in that business.

The work is now submitted to the profession in the hope that to some extent at least it may save labor, simplify procedure, and aid in the administration of justice.

S. M.

Fremont, August 1st, 1880.

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CHAPTER I.

LIMITATION OF ACTIONS.¹

Civil actions can only be commenced within the time prescribed in this title after the cause of action shall have accrued.

For the recovery of real property. An action for the recovery of the title or possession of lands, tenements, or hereditments can only be brought within ten years after the cause of action shall have accrued. This section shall be construed to apply also to mortgages.

Persons under disability. Any person entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments, who may be under disability when the cause of action accrues, may bring such action within ten years after the disability is removed, and at no time thereafter.

An action for the forcible entry and detainer, or forcible detainer only, of real property can only be brought within one year after the cause of such action shall have accrued.

Civil actions other than for the recovery of real property can only be brought within the following periods after the cause of action shall have accrued:

Within five years, an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment.

Within four years, an action upon a contract not in writing, expressed or implied; an action upon a liability created by statute other than a forfeiture or penalty.

Within four years, an action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated; an action for relief

¹ Title II Code of Civil Procedure.

on the ground of fraud, but the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

Within four years. Actions brought for damages growing out of the failure or want of consideration of contracts, express or implied, the consideration of which has wholly or in part failed, shall be brought within four years.

Within ten years. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute, can only be brought within ten years.

Within one year, an action for libel, slander, assault and battery, malicious prosecution, or false imprisonment; an action upon a statute for a penalty or forfeiture; but where the statute giving such action prescribes a different limitation the action may be brought within the period so limited.

Within four years. An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued.

Disability of Plaintiff. If a person entitled to bring any action mentioned in this title, except for a penalty or forfeiture, be at the time the cause of action accrues within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this title after such disability shall be removed. The absence from the state, death, or other disability of a non-resident, save the cases mentioned in this section, shall not operate to extend the period within which actions *in rem* shall be commenced by and against such non-resident or his legal representatives.

All actions or causes of action which are or have been barred by the laws of this state or any state or territory of the United States shall be deemed barred under the laws of this state.

An action shall be deemed commenced within the meaning of this title, as to the defendant, at the date of the summons which is served on him; where service of publication is proper the action shall be deemed commenced at the date of the first publication, which publication shall be regularly made.

Time not computed. If when a cause of action accrues against a person he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is absconded or concealed; and if after a cause of action accrues he depart from the state, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

When a cause of action has been fully barred by the laws of any state or country where the defendant has previously resided, such bar shall be the same defense in this state as though it had arisen under the provisions of this title.

Part payment or new promise in writing. In any cause founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of any existing liability, debt, or claim, or any promise to pay the same shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise.

*Formerly the statute of limitations was regarded as one of presumption, which the slightest acknowledgment was sufficient to overcome. It is merely a statute of repose, and proceeds upon the policy of refusing to enforce a stale claim whether it has been paid or not. *Hurley v. Cox*, 9 Neb., 230. *Mayberry v. Willoughby*, 5 Id., 368. *Chapman v. Kimball*, 7 Id., 399.

Adverse possession. If an adverse occupant has maintained an exclusive adverse possession for the full extent of the statutory limit, the statute vests him with the right of property, which carries with it the right of possession, and therefore the title becomes complete in him. *Horbach v. Miller*, 4 Neb., 46.

The law in force at the time the suit is brought is applicable to the cause of action. *Id.*

If a party is himself, or in connection with those under whom he claims, in actual, notorious, continuous, and exclusive possession of land for the statutory period, he thereby, except as to persons under disability, acquires a title to the land; and this irrespective of any question of *motive* or *mistake*. *Yetzer v. Thoman*, 17 O. S., 132.

Tax deed. A tax deed must conform substantially to the requirements of the statute under which it is executed. If the seal of the county be omitted in its authentication the deed is void. Nor is it admissible even to show color of title under the special limitation of the revenue act.

Where a recovery upon a note, secured by mortgage, is barred by the statute of limitations, an action of foreclosure is also barred. *Kyger v. Ryley*, 5 Neb., 22. *Peters v. Dunnells*, 5 Id., 466. *Hurley v. Estes*, 6 Id., 386. *Hurley v. Cox*, 9 Id., 230.

Where the note and mortgage have been executed since the act of 1869 took effect they are barred in ten years. *Hale v. Christy*, 8 Neb., 264.

Where a deed, absolute on its face, but in fact a mortgage to secure the payment of money, has been given upon unoccupied lands, the statute of limitations does not begin to run against the right to redeem until a tender is made of the money secured by the mortgage, and a refusal to reconvey. *Wilson v. Richards*, 1 Neb., 344.

An action against the sureties of an officer on his official bond is barred by the same limitation that bars an action against the officer alone. *State v. Blake*, 2 O. S., 147.

The bar of the statute cannot be evaded by amending a petition so as to bring in new parties; whereas, as to such new parties, the statute would not permit the bringing of a new action. *Meara v. Holbrook*, 20 O. S., 137-150.

Co-sureties. The right of action for contribution among co-sureties accrues when one has paid more than his proportion of their liability. *Camp v. Bostwick*, 20 O. S., 337.

Part payment. To take a debt out of the statute by part payment, such payment must be made by the party to be charged thereby, or by his direction. *Mayberry v. Willoughby*, 5 Neb., 368. *Marienthal v. Mosler*, 16 O. S., 566-573.

Negligence. Where a justice of the peace neglects to write out an appeal bond over the name of the surety signed in blank, the statute begins to run from the date of the negligence, and not from the time the plaintiff acquired knowledge of it. *Lathrop v. Snellbaker*, 6 O. S., 276. *Kerns v. Schoonmaker*, 4 Ohio, 331.

The limitation in favor of officers begins to run from the time of

the negligent act complained of: against an attorney, whenever he is chargeable with neglect; against a sheriff or constable, for making a false return, from the time of the return of the writ.

The statute begins to run whenever the creditor could bring his action, not when he knew he could where there is no fraud. 3 Parsons on Contracts (5th ed.), and cases cited in note K.

If an action rests on breach of contract a cause of action accrues as soon as the contract is broken, although no injury result from the breach until afterwards. Id. and cases cited in note E.

If money is payable in installments, the statute begins to run as to each installment from the time it becomes due; but if there is an agreement that, upon default as to any one, all then unpaid shall become due, the statute begins to run as to all upon any default. Id., 93. *Hemp v. Garland*, 4 Q. B., 519. Angell on Limitations, § 111.

A promise by one joint debtor will not take the debt out of the statute of limitations as to his co-contractors unless he is specially and severally authorized for that purpose. *Mayberry v. Willoughby*, 5 Neb., 368.

Upon the dissolution of a partnership the relation of partners to their debtors becomes that of joint debtors, and they cannot bind their former co-partners by a new promise. Id.

An action of foreclosure is a proceeding in rem, at least so far as it is sought to subject the mortgaged property to the payment of the mortgage debt, and comes within the proviso to section 17. The statute will run, therefore, even if the defendant is absent from the state. *Peters v. Dinnells*, 5 Neb., 466. *Hurley v. Estes*, 6 Id., 386. *Hurley v. Cox*, 9 Id., 130.

Discovery of fraud. The presumption is, that if any party, affected by any fraudulent transaction or management, might with ordinary care and attention have seasonably detected it, he is charged with actual knowledge of it. Angell on Limitations, § 187.

Mere silence not enough; there must be fraudulent concealment. A party seeking to avoid the bar of the statute on account of fraud must aver and prove that he used due diligence to detect; it and if he had the means of discovery in his power, he will be held

to have known it. Concealment by mere silence is not enough; there must be some trick or contrivance intended to exclude suspicion and prevent inquiry. *Wood v. Carpenter*, Sup. Court U. S., 14. *Western Jurist*, 70.

The common law disability of married women is removed in this state, and they no longer come within the exception of section 17, Title 2 of the code. *Pope v. Hooper*, 6 Neb., 187.

The absence of one joint debtor from the state suspends the running of the statute against him, although his co-debtor has remained in the state. *Denny v. Smith*, 18 N. Y., 567.

Successive absences from the state may be accumulated, and their aggregate deducted from the period of limitation, but the absences must be of such character as for the time being to suspend the power of the plaintiff to commence his action. *Blodgett v. Utley*, 4 Neb., 25.

The statute runs against a debt only from the time the debtor becomes a *resident* of the state. *Edgerton v. Wachter*, 9 Neb., 500.

Proceedings in error, under the provisions of the act of 1877, must be commenced within one year from the rendition of the judgment or the making the final order complained of. *Roesink v. Barnett*, 8 Neb., 146.

Summons in error. Upon filing the transcript and a petition in error in the appellate court, a summons in error must be issued and served on the defendant in error, unless it is waived. No summons is necessary in appeal cases.

County warrants do not fall within the provisions of the statute and are not affected by it. *Brewer v. Otoe Co.*, 1 Neb., 382.

In *Elmendorf v. Taylor*, 10 Wheaton, 152, the supreme court of the United States held that, although the statute of limitations did not properly extend to suits in equity, yet the courts universally acknowledged their obligation. It was formerly held that courts of equity were not within the words of the statute, because the words apply only to particular legal remedies. *Hovanden v. Lord Annesley*, 2 Sch. & Lef., 329. Hence courts of equity have sometimes assumed the right to disregard the statute. But in this state there is no distinction between law and equity. The statute applies with equal force to both.

And this is the rule adopted by the supreme court of the United States. *Merchants National Bank v. Carpenter*, 9 Reporter, 300.

CHAPTER II.

NATURE AND FORM OF ACTIONS.

Section 2 of the code provides that "the distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action."

The legislature has thus swept away the forms and classification of actions which existed before the adoption of the code. All actions are called "civil actions." It is therefore unnecessary for the plaintiff to designate the action as at law or in equity. He is only required to set forth in his petition his cause of action, and if under the rules of law the facts therein stated entitle him to relief of any kind, he will have a good petition.

While the forms of action have been abolished, relief, whether legal or equitable, is still administered as heretofore. As was said by the supreme court of this state in *Wilcox v. Saunders*, 4 Neb., 587, "The code does not profess to abrogate that distinction, which in the very nature of things must always exist between legal and equitable rights and remedies, nor to deprive any person of as complete redress for every conceivable wrong done to him in his person or estate as he formerly could have had. But it does require that, whatever the nature of the right to be enforced or the wrong to be redressed, whether such as formerly would have been cognizable in either a court of chancery or in a court of law, the simple form of a *civil action* must be followed, in which a plain statement of the material facts constituting the cause of action or the defense must be set forth in concise language and without repetition. Thus, while the ancient forms of actions are now abolished, all the various reme-

dies known to the law remain, and are administered through the medium of the single 'civil action' of the code quite as certainly and much more speedily than under the former practice."

CHAPTER III.

PARTIES TO AN ACTION.

Section 3 of the code provides that "the party complaining shall be known as plaintiff, and the adverse party as defendant,"

Section 30 provides that "Every action must be prosecuted in the name of the real party in interest, except as provided in section thirty-two; and the assignee of a thing in action may maintain an action thereon in his own behalf without the name of the assignor."

Real party in interest. It may be stated as a general proposition that where a thing in action is assigned absolutely, so that the assignee becomes in fact the owner thereof, he is the real party in interest, and it is not material whether his title is legal or equitable—he may maintain an action in his own name.

The code makes nothing assignable that was not so before. The only change made is to transfer, with the beneficial interest, the right of action also in those cases where before the court would recognize and protect the rights of the assignee. No new right of action is created; no authority is given to assign a right of action not before assignable. *Hodgman v. Western R. R. Co.*, 7 How. Pr., 462. *Noonan v. Orton*, 34 Wis., 259.

What rights of action are assignable. By the statute 3 Edward III., Chap. 8; which is treated as a part of the common law, every kind of injury to personal property, by reason of which it has been rendered of less value to the estate, gives a right of action which survives to the personal representative, while a right which springs from personal injury dies with the party. Bliss on Code Pleading, § 39.

Section 454 of the code provides that "In addition to causes

of action which survive at common law, causes of action for *mesne* profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive."

Section 455 provides that "no action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office." It has been held that a breach of promise of marriage is of such a personal nature as not to survive the death of either party. *Chamberlain v. Williamson*, 2 Man. and Sel., 408. *Lattimore v. Simmons*, 13 S. and R., 183. *Stebbins v. Palmer*, 1 Pick., 71. *Smith v. Sherman*, 4 Cush., 408.

What rights of action not assignable. As a general rule it may be stated that mere *personal* torts, which die with the party, and do not survive to his personal representatives, are not assignable. *Comegys v. Vasse*, 1 Peters, 209. *Byxbie v. Wood*, 21 N. Y., 607. And, as a general rule, the converse of the proposition is true, that rights of action which survive are assignable.

In *Alpin v. Morton*, 21 O. S., 536, it is held that an action of slander does not abate by the death of the *plaintiff*. The court say: "It seems to have been the purpose of the section (having previously quoted sec. 555) to provide that the defendant in no case whatever should gain a case by the death of his adversary, although, if the plaintiff's case be one of those enumerated, he may be defeated by the death of the *defendant*."

Section 32 provides that "An executor, administrator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

An express trust is thus defined: "It is intended manifestly to embrace not only formal trusts declared by deeds *inter partes*, but all cases in which a person, acting in behalf of a third party, enters into a written express contract with another, either in his own individual name, without description, or in his own name ex-

pressly in trust for, or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name, a contract is made for the benefit of another." *Considerant v. Brisbane*, 22 N. Y., 389.

When a contract is entered into with an agent in his own name, the promise being made directly to him, although it is known he is acting for a principal, he may maintain an action upon the contract in his own name without joining the person beneficially interested therein. *Rowland v. Phalen*, 1 Bosc., 43. *Firebrick Co. v. Cook*, 44 Mo., 29. *Wright v. Tinsley*, 30 Id., 389. Thus, in *Considerant v. Brisbane*, the defendant had given a note of which the following is a copy to an agent:

"NEW YORK, March 1, 1855.

"On the first day of July, 1855, I promise to pay V. Considerant, executive agent of the Company Bureau, Guillon, Gooden & Co., the sum of \$5000, for which I am to receive stock of said company, known as premium stock, to the amount of \$5000, value received.

"A. BRISBANE."

The court held that the agent could maintain the action in his own name.

Action by agent on the following note: "Twelve months after date I promise to pay W. M. Winters, or any authorized agent of the Pacific Methodist College, the sum of \$1,150 for the endowment of said college." The court held the action properly brought in the name of the agent. *Winters v. Rush*, 34 Cal., 136.

Action by agent. A note was by consent of all the parties interested given to one who held it in trust for others. An action by the payee alone was held to be properly brought. *Scantlin v. Allison*, 12 Kan., 85. But an agent cannot sue in his own name to enforce an implied liability to his principal.

The above provision of the code is permissive merely, and applies to that class of trustees described as "persons with whom or in whose name a contract is made for the benefit of another." It authorizes the agent in such cases to bring an action in his own name, but does not prohibit the beneficiaries from bringing the

action, even without the trustee. *Hubbell v. Medbury*, 53 N. Y., 98. *Rice v. Savery*, 22 Iowa, 470.

Trustees appointed by judicial proceedings in court, or by an instrument in the nature of a grant or conveyance, may sue without joining the beneficiaries, thus: assignees to pay creditors. *Lewis v. Graham*, 4 Abb. Pr., 106. *St. Anthony's Mill Co. v. Vandall*, 1 Minn., 246. The grantee of lands in trust for the use and benefit of another. *Boardman v. Beckwith*, 18 Iowa, 293. *Goodrich v. Milwaukee*, 24 Wis., 422.

An *auctioneer* may sue for the price of goods sold by him, whether he has any interest in the price or not. It is not necessary to prove that he has a special property or interest, for that follows, as a matter of course, from his position as auctioneer. *Minturn v. Main*, 7 N. Y., 220. *Bogart v. O'Regan*, 1 E. D. Smith, 590. But the owner of the goods may also sue.

A *sheriff* may maintain an action for the price of property sold by him. *Jones v. Null*, 9 Neb., 1. *Armstrong v. Vroman*, 11 Minn., 220. *McKee v. Lineberger*, 69 N. C., 217. When property has been seized under an order of attachment by a sheriff, he is the proper party to maintain an action for the conversion of the same, and the attachment creditors cannot join with him in the action. *Schaeffer v. Marienthal*, 17 O. S., 184.

An *action on a county treasurer's bond* in behalf of the public must be brought in the name of the obligee of the bond. *Albertson v. The State*, 9 Neb., 429. *Hunter v. Commissioners*, 10 O. S., 515. But under section 643 of the code an *individual* sustaining injury by a breach of the conditions of the bond may bring an action thereon in his own name. *Stewart v. Carter*, 4 Neb., 564. *Hoffman v. Kopplekom*, 8 Id., 344.

A *county treasurer* may maintain an action in his own name for license moneys which have been collected to which the county is entitled. *City of Tecumseh v. Phillips*, 5 Neb., 302. *Lincoln v. White*, Id., 505. *The State, ex rel. Noonan*, 6 Id., 12.

A *married woman* may maintain an action in her own name for any matter in relation to her separate business or estate, or for injuries to her person. * *Omaha Horse Railway Co. v. Doolittle*, 7 Neb., 481. *May v. May*, 9 Id., 16.

A *public nuisance* can be abated only by a public prosecution,

instituted by the proper public officer in behalf of the state. *Kittle v. Fremont*, 1 Neb., 329. *Shed v. Hawthorn*, 3 Id., 179.

If a party in such case does or will sustain *special damage*, distinct from the public at large, he may maintain an action in his own name. *Id.*

An action in the name of the state may be instituted by a citizen against an officer, where the question is one of public right, to procure the enforcement of a public duty. *State v. Shropshire*, 4 Neb., 413.

The lowest responsible bidder, or a tax payer of a county, may maintain an action in a proper case to compel the county commissioners to let contracts for the construction of public buildings and the improvement of public roads to the lowest responsible bidder. *The People v. Commissioners*, 4 Neb., 161. *Folmer v. Nuckolls Co.*, 6 Id., 204.

An action may be maintained by a tax payer in his own behalf, and on behalf of all other tax payers of the county, to enjoin the collection of an illegal tax. *The U. P. R. R. v. Buffalo Co.*, 9 Neb., 449. *Dundy v. Richardson Co.*, 8 Id., 508. *Normand v. Otoe Co.*, Id., 18. *Matheny v. Golden*, 5 O. S., 361. *Glenn v. Waddell*, 23 Id., 605. *Upington v. Oviatt*, 24 Id., 232.

The assignee of a mechanic's lien may maintain an action thereon in his own name. *Rogers v. The Omaha Hotel Co.*, 4 Neb., 59.

A widow and her minor children constituting one family may maintain a joint action for loss of means of support against those who furnished intoxicating liquor to the husband and father, thereby causing his death. *Roose v. Perkins*, 9 Neb., 304.

Partnership. Any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued in the partnership name.

Where a corporation sues or is sued it must be designated by its corporate name.

A City of the first or second class must sue or be sued in the corporate name, thus: "The city of —."

A town or village, containing not less than two hundred inhabitants nor more than fifteen hundred, may sue and be sued as the "Village of —." Laws of 1879, 202-7.

A county must sue and be sued by the name of "The County of —." Laws of 1879, 359.

Who cannot unite as plaintiffs. When the property of different persons has been taken or injured, even by the same act and person, they cannot unite as plaintiffs, but must sue separately. But they may unite if the parties have a joint legal interest in the property. Pomeroy on Remedies, § 231.

WHO SHOULD BE MADE DEFENDANTS.

Interest adverse to plaintiff. Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. Code, § 41.

Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff. Id., § 44.

Costs. Section 624 provides that "where several actions are brought on one bill of exchange, promissory note, or other obligation or instrument in writing, against several parties, who might have been joined in the same action, as allowed by section forty-four, no costs shall be recovered by the plaintiff in more than one of such actions if the parties proceeded against in other actions were, at the commencement of the previous action, openly within the state.

Section 46 provides that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy cannot be made without the presence of other parties the court must order them to be brought in."

Where a party may intervene. When in an action for the recovery of real or personal property any person having an interest in the property applies to be made a party the court may order it to be done. Code, § 47.

Judgment creditor substituted for officer. In action against a sheriff or other officer for the recovery of property taken under an execution and replevied by the plaintiff in such action the

court may, upon application of the defendant and of the party in whose favor the execution is issued, permit the latter to be substituted as the defendant, security for costs being given. Code, § 50.

In cases of joint torts any or all of the wrong doers may be made defendants, at the option of the injured party; but he cannot thereby multiply his damage—he can have but one satisfaction. *McReady v. Rogers*, 1 Neb., 124. *Turner v. Hitchcock*, 20 Iowa, 310. *Kasson v. The People*, 44 Barb., 347.

If a husband and wife be sued together the wife may defend for her own right, and if the husband neglect to defend she may defend for his right also.

The rule in regard to the joinder of defendants in equity may be stated thus: When a right is claimed which is opposed to the interests of *all* the defendants, all those interested in the subject matter may be joined as defendants, although they have separate and distinct rights. As where a bill was filed to quiet a general right of fishing against several defendants it was held that, although there were no points between them and the plaintiff, yet as they claimed distinct rights in the subject matter the bill would lie. *Whaley v. Dawson*, 1 Sch. & Lef., 370. *N. Y. & N. H. R. R. v. Schuyler*, 17 N. Y., 592. See also *The U. P. R. R. v. McShane*, 22 Wallace, 462.

The rule is thus stated by Chancellor Kent: “A bill against several persons must relate to matters of the same nature, and having a connection with each other, and in which all the defendants are more or less concerned, though their rights in respect to the general subject of the case may be distinct.” *Brinkerhoff v. Brown*, 6 Johns. Ch., 138.

In the case of the *N. Y. & N. H. R. R. v. Schuyler et al.*, 17 N. Y., 592, an action was brought by the company against its former president and three hundred and twenty-six other persons to have certain certificates of stock of said company held by them declared fraudulent and void. On demurrer to the petition the court held that there was but a single interest in the plaintiff which was opposed to the interests of all the defendants, and they could be joined in a single suit.

A plaintiff cannot join several matters of different kinds against

several defendants, as where land is sold in different tracts to different purchasers they cannot be united in an action for specific performance. *Fellows v. Fellows*, 4 Con., 683. *Voorheis v. Voorheis*, 24 Barb. *Rene v. Stryker*, 6 Abb., 107.

If the mortgagor has conveyed the mortgaged premises to another, the grantee, who is the owner at the time the action is commenced, is a necessary party, even though his deed has not been put on record. And in such case the mortgagor is a proper party when a personal judgment is sought against him for a deficiency.

Foreclosure of mortgage. All parties having an interest in the mortgaged premises not adverse to the mortgagor are necessary parties to a suit to foreclose a mortgage. *Tootle v. White*, 4 Neb., 403. *Shellenbarger v. Biser*, 5 Id., 195.

All incumbrancers should be made parties; they are proper parties whether prior or subsequent. Story's Eq. Pl., 177. 2 Barb. Ch. Pr., 174.

The holder of a prior mortgage which is due is a proper but not a necessary party, but if not made a party his lien remains in full force; but the holder of a subsequent mortgage or a subsequent judgment creditor is a *necessary* party in order to bar his right to redeem. The better course, however, is to make all incumbrancers parties in order to give a perfect title to the premises by a sale under the decree, as the purchaser takes merely the title of the parties to the suit. 4 Kent Com., 184-5. *Shellenbarger v. Biser*, 5 Neb., 195.

The rule as to prior incumbrances is thus stated by Judge Curtis in *Hagan v. Walker*, 14 Howard, 37: "We consider the true rule to be that, where it is the object of the bill to procure a sale of the land, and the prior incumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may be correctly said to be a necessary party, that is, necessary to such a decree. But it is in the power of the court to order a sale subject to the prior incumbrance—a power which it will exercise in fit cases. And where the prior incumbrancer is not subject to the jurisdiction of the court, or cannot be joined without defeating the jurisdiction, and the va-

lidity of the incumbrance is admitted, it is fit to dispense with his being a party."

The wife of the mortgagor, where the mortgage is given to secure the purchase money, is a necessary party in order to extinguish her contingent right of dower, which cannot be set up against the mortgagee. *Mills v. Van Voorheis*, 20 N. Y., 412, 1st Abb., 152.

A party claiming adversely to the title of the mortgagor, and prior to the execution of the mortgage, cannot properly be made a party for the purpose of trying such adverse claim of title. But when the adverse claimant submits his title to the court under proper issues for an adjudication, he will be bound by the decree. *Shellenbarger v. Biser*, 5 Neb., 185. *Lounsbury v. Catron*, 8 Id., 469. *Hurley v. Cox*, 9 Id., 230.

CHAPTER IV.

JOINDER OF ACTIONS.¹

The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable or both, when they are included in either of the following classes:

First. The same transaction or transactions connected with the same subject of action.

Second. Contracts, express or implied.

Third. Injuries, with or without force, to person and property, or either.

Fourth. Injuries to character.

Fifth. Claims to recover the possession of personal property, with or without damages for the withholding thereof.

Sixth. Claims to recover real property, with or without dam-

¹ Title VI of the Code of Civil Procedure.

ages for the withholding thereof, and the rents and profits of the same.

Seventh. Claims against a trustee by virtue of a contract or by operation of law.

The causes so united must affect *all the parties* to the action, and not require *different* places of trial.

An action is defined to be a proceeding for the redress or prevention of a wrong. Bliss on Code Pleading, § 1. No definition of the word "transaction" has been attempted by any court so far as I am aware. Each case must be decided upon its own circumstances; the words "subject of action" evidently refer to the subject matter of the action.

In construing the word "transaction" the Supreme Court of California, in *Jones v. Steamboat Cortes*, 17 Cal., 487, say: In an action for damages where the plaintiff had purchased a ticket from San Francisco to San Juan, she was carried on to Panama, the boat failing to stop at San Juan. In consequence thereof, she was subjected to pecuniary loss, and was subjected to many personal injuries and discomforts. "The plaintiffs have brought their suit upon the whole case to recover damages, not only for a breach of the contract, but for the wrongs and injuries committed by the owner and agents of the defendants in that connection. The defendants are liable for all the damages resulting from these causes; and there is certainly no impropriety in adjusting the whole matter in one controversy."

In a case in the Kansas reports the petition set forth two causes of action, which arose in the following manner: H. met C., called him a thief, charged him with stealing a horse, and had him arrested and imprisoned. A. brought an action against H. for slander and false imprisonment. On demurrer to the petition for misjoinder, the court overruled the demurrer upon the ground that the injuries arose out of the *same transaction*. *Harris v. Avery*, 5 Kansas, 146.

These decisions have been questioned, but no good reason can be given why all the injuries which a party has sustained in one transaction should not be included in one action, and avoid a multiplicity of suits.

All causes of action arising from the same transaction, or transac-

tions connected with the same subject of action, may be united, and this includes causes of action, legal and equitable, *ex contractu* and *ex delicto*. But if the causes of action do not arise out of the same transaction, or transactions connected with the same subject of action, the causes of action, *ex contractu*, cannot in general be joined with causes of action *ex delicto*. *Sturges v. Burton*, 8 O. S., 215-218.

A suit may be maintained to reform an instrument and enforce the collection of money upon such instrument when so reformed. *Stewart v. Carter*, 4 Neb., 564. *Globe Ins. Co. v. Boyle*, 21 O. S., 120.

Double aspect. When the title to relief in equity will be precisely the same in each case, the plaintiff may, if there is doubt as to his title, aver facts of a different nature which will equally support his application. See *post*, *Forms of Petitions*. *Williams v. Lowe*, 4 Neb., 394. *Warren v. Callender*, 20 O. S., 190. *Sturges v. Burton*, 8 Id., 215.

Contracts, express or implied. This includes all contracts, whether such as at common law were denominated simple contracts, or specialties and implied contracts. An implied contract is an obligation created by law. Thus: If I employ a person to perform any service for me the law implies that I agree to pay him the real value of his services; so the legal obligation of husband or father to pay for necessities furnished his wife or minor children creates an implied obligation to pay for such necessities; and also in case of the failure to perform the conditions of an express contract, that the party failing will pay the adverse party such damages as he may sustain by his neglect or refusal.

Injuries to persons and property. Pomeroy, in his work on remedies, § 495, has collated the cases where causes of action arising from injuries to property have been held properly joined: "For damages resulting from the unlawful throwing down of the fences on plaintiff's farm, whereby cattle entered and destroyed the growing crops; for damages caused by water thrown on the farm by means of an embankment; for damages from earth piled upon the farm, obstructing the passage of teams and the free use of the land; for damages occasioned by the killing of cattle by means of passing engines." *Clark's adm. v. H. & St. J. R. R.*, 36 Mo., 202. See *Tendesen v. Marshall*, 3 Cal., 440.

"*Injuries caused by the bursting of defendant's dam, negligently constructed, whereby gold bearing earth was washed away, and damages resulting from the delay and hinderance in working the mine.*" *Fraser v. Sears Union Water Co.*, 12 Cal., 555.

When the petition contained two counts, "the first being for trespasses done to the land prior to its conveyance to the plaintiff, the claim having been assigned to him, and the second alleging that the plaintiff was the owner and in possession of the land, and that the defendants were about to enter upon the same and quarry and carry away minerals therefrom, and prayed an injunction restraining the trespasses, the two causes of action were held to be properly joined, although one was legal and the other equitable." *Moore v. Massini*, 32 Cal., 590-5.

It may be questioned whether the joinder was proper in this case.

"On the same principle, in a suit to recover possession of land a separate cause of action may be added to restrain a threatened trespass and commission of waste." *Natoma Water Co. v. Clarkson*, 14 Cal., 544.

"*A cause of action for deceit practiced in the sale of chattels may be joined with one for the unlawful taking and conversion of goods; the claim of damages for the fraud in such a case arises from an 'injury to property within the meaning of the Code.'*" *Cleveland v. Barrows*, 59 Barb., 364.

All claims arising from injuries of all kinds to persons, whether with or without force, may be united in one action, and the same rule obtains as to injuries to property.

Injuries to character. A cause of action for slander may be united in the same petition with a cause of action for malicious prosecution, both being for injuries to character. *Shore v. Smith*, 15 O. S., 173. *Martin v. Mattison*, 8 Abb. Pr., 3. *Hall v. Vreeland*, 18 Id., 182. *Watson v. Hazzard*, 3 Code Rep., 218.

Claims to recover possession of personal property, etc. This is known as the action of replevin, and will be discussed in the chapter under the title.

Claims to recover real property, etc. This is the common law action of ejectment, but containing in addition a provision for damages for withholding the property. See *post*, title REAL ACTIONS.

Claims against a trustee, etc. Under this provision a plaintiff may unite in one petition express and implied trusts.

The causes of action must be between the same parties in the same right. A party cannot be sued in a representative character and also as an individual. *Ferrin v. Myrick*, 41 N. Y., 315. *Austin v. Monroe*, 47 Id., 360.

A *cause of action* is said to accrue when a wrong has been committed or a breach of duty has occurred.

In practice, a running account, in the absence of any agreement for payment at stated periods, is treated as one cause of action although composed of various items of different dates. In *Beck v. Devereaux*, 9 Neb., 13, a manufacturer of cigars furnished them to a dealer under an agreement that the amount of the account for each month was at the end thereof to become due and payable, and bills were made out accordingly. *Held*, that the account for each month constituted a separate demand.

When several causes of action will be deemed entire. Tender by different persons acting as agents of the plaintiff, at different places, of separate lots of grain for transportation, all making the quantity refused to be transported, constitute but one cause of action for the refusal to transport the whole quantity. *Mount v. Nehart*, 11 Iowa, 57. *Cobb et al. v. The Ill. C. R. R. Co.*, 38 Id., 601.

CHAPTER V.

THE COUNTY IN WHICH ACTIONS ARE TO BE BROUGHT.¹

Section 51. Actions for the following causes must be brought in the county in which the subject of the action is situated, except as provided in the following section:

First. For the recovery of real property, or an estate, or interest therein.

An action to set aside a conveyance as fraudulent, and that

¹Title IV of the Code.

it be held in trust for another, is an action to determine an interest in real estate. *Wood v. Hollister*, 3 Abb. Pr., 14.

Second. For the partition of real property.

Third. For the sale of real property under a mortgage lien, or other incumbrance, or charge.

Section 52. If the real property, the subject of the action, be an entire tract, and situated in two or more counties, or if it consists of separate tracts situated in two or more counties, the action may be brought in any county in which any tract or part thereof is situated, unless it be an action to recover possession thereof. And if the property be an *entire* tract, situated in two or more counties, an action to recover possession thereof may be brought in either of such counties; but if it consists of *separate* tracts in *different* counties, the possession of such tracts must be recovered by separate actions brought in the counties where they are situated.

Section 53. An action to compel the specific performance of a contract of sale of real estate may be brought in the county where the defendants or any of them reside.

Section 54. Actions for the following causes must be brought in the county where the cause or some part thereof arose:

First. An action for the recovery of a *fine, forfeiture, or penalty*, imposed by a statute; except that where it is imposed for an offense committed on a river or other stream of water, or road, which is the boundary of two or more counties, the action may be brought in any county bordering on such river, watercourse, or road, and opposite to the place where the offense was committed.

Second. An action against a public officer for an act done by him in virtue or under color of his office, or for a neglect of his official duty.

Plea to the merits waives objections. In an action against a public officer, brought in a different county from that in which he resides and holds his office, for a wrongful act done by him under color of his office, if he voluntarily appear and plead to the merits of the case, he thereby waives all objections to the jurisdiction of the court. *Kane v. The Union Pacific R. R.*, 5 Neb., 105.

Liability. In such case the liability of both principal and sure-

ties on his bond is original and primary, and the action lies against both, without having sued the officer for the tort. *Id.*

Third. An action on the official bond or undertaking of a public officer.

The official bond of a sheriff is not void by reason of its being given to the state instead of the proper county as the obligee. This is but an irregularity which in nowise affects the liability of a sheriff or his sureties in an action thereon for damage occasioned by official misconduct. *Huffman v. Kopplekom*, 8 Neb., 344.

Section 55. An action other than one of those mentioned in the first three sections of this title, against a corporation created by the laws of this state, may be brought in the county in which it is situated or has its principal office or place of business; but if such corporation be an insurance company the action may be brought in the county where the cause of action or some part thereof arose.

Section 56. An action against a railroad company, or an owner of a line of mail stages, or other coaches, for an injury to person or property upon the road or line, or upon a liability as a carrier, may be brought in any county through or into which the said road or line passes.

Section 57. An action other than those mentioned in the first three sections of this title, against a turnpike company, may be brought in any county in which any part of the road lies.

Section 58. The provisions of this title shall not apply in the case of any corporation created by a law of this state, whose charter prescribes a place where along a suit against such corporation may be brought.

Section 59. An action other than one of those mentioned in the first three sections of this title, against a non-resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause of action or some part thereof arose.

Section 60. Every other action must be brought in the county

in which the defendant or some one of the defendants resides or may be summoned.

Joint contractors. In *Dunn v. Hazlett*, 4 O. S., 436, it was held that where two are sued as joint contractors, one of whom resides in the county in which suit is brought, and the other in another county, service of a summons is made on each in the county in which he resides, and it turns out that the person residing in the county where the action is brought is not liable as a joint contractor, the plaintiff ought not to recover against the one residing in the foreign county.

The above action was tried in the common pleas, under the practice existing prior to the adoption of the code. A declaration was filed against both defendants jointly. They appeared and pleaded the general issue. The court found that Smith was not jointly bound with Dunn, and non-suited the plaintiff. The nonsuit was afterwards set aside and the declaration amended by striking out the name of Smith. The court held that the plea of the general issue was a denial of proper service, and the action having been dismissed against the resident of the county where it was brought could not proceed against the non-resident.

Want of jurisdiction. H. H. & Co., residing in Cuyahoga county, Ohio, assigned to A., as collateral security for a debt due from them to A., an account claimed to be due them from M., who resided in Hamilton county, and A. brought suit in Cuyahoga county against H. H. & Co. and M. as defendants, and obtained service of summons against M. in Hamilton county only, and M. answered, not only to the merits, but also in the same answer denying the jurisdiction of the court. *Held*, that the action was rightfully dismissed for want of jurisdiction as to M. *Allen v. Miller*, 11 O. S., 374.

Not nominal defendants. The court held that the words "defendant" and "defendants," as employed in the code, so far as they affect the question of jurisdiction, must be held to mean not nominal defendants merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought. *Id.*, 378.

This objection may, however, be waived and will be waived if the de-

fendant improperly summoned fail to plead the want of jurisdiction.

In an action against several defendants it must appear from the sheriff's return that some one of them was served with summons in the county where the action is pending, or there can be no judgment rendered against any of them by default. *Pottenger v. Mayfield*, 14 B. Monroe, 647.

A witness is not liable to be sued in a county in which he does not reside by being served with summons in such county, while going, returning, or attending in obedience to a subpoena. Code, § 363.

Change of venue. Section 61. In all cases in which it shall be made to appear to the court that a fair and impartial trial cannot be had in the county where the suit is pending, or when the judge is interested, or has been counsel in the case or subject matter thereof, or is related to either of the parties, or otherwise disqualified to sit, the court may, on application of either party, change the place of trial to some adjoining county, wherein such impartial trial can be had; but if the objection be against all the counties of the district, then to the nearest county in the adjoining district.

A motion for a change of venue is addressed to the sound discretion of the court, and its ruling thereon will not be disturbed when there is no abuse of that discretion. *Smith v. The State*, 4 Neb., 277. *Bank of Cleveland v. Ward*, 11 Ohio, 128.

The venue should not be changed on the affidavit of the party alone, but only on clear and satisfactory proof that a fair and impartial trial probably cannot be had in the county where the suit was commenced. *The Bank of Cleveland v. Ward*, 11 Ohio, 128.

The defendants should not be subjected to the vexation and expense of trying their case in a distant county because the plaintiff alone entertains the opinion that justice cannot be administered at home. *Id.*, 130.

Removed to wrong county. When a case is removed from a district court of one county to the district court of the county of an adjoining district, the objection that the county to which the case is removed is not the nearest county, if not taken before a trial upon the merits, will be regarded as waived, and cannot be

interposed by a motion in arrest of judgment to defeat the jurisdiction of the court. *Skelly v. Jefferson Branch State Bank*, 9 O. S., 607.

Motion for Change of Venue.

[Title of Cause.]

The defendant moves the court for a change of the place of trial of this cause for the following reasons:

First. Because [state grounds as in affidavit].

Second.

A. B.,

By his Attorney.

Affidavit for Change of Venue.

[Title of Cause.]

THE STATE OF NEBRASKA, }
.....COUNTY. }

A. B., being first duly sworn, deposes and says that he is a resident of said county and has resided therein for....years last past, that he is well acquainted with the citizens therein, and knows their sentiments in regard to this case, and he verily believes a fair and impartial trial cannot be had of said cause in said county, on account of the bias [*or prejudice*] of the citizens thereof.

A. B.

Subscribed in my presence, and sworn to before me, this..... day of.....18....

.....Clerk of the District Court.

When it is sought to change the venue on the ground that a fair and impartial trial cannot be had in the county, it is sufficient to show in the affidavit the means of knowledge of the affiants, and their sworn opinions formed from their own knowledge as to the probabilities of obtaining a fair trial, as the case at best is a matter of opinion.

Counter affidavits. After the party applying for the change has filed his affidavits, the adverse party may file counter affidavits in opposition to the motion. *Smith v. The State*, 4 Neb., 277.

Where the judge is interested. If the change is sought on the ground that the judge is interested, or has been of counsel in the

case or subject matter thereof, or is related to either of the parties, or otherwise disqualified to sit, the affidavit should allege positively the ground of disqualification.

Bill of exceptions. If either party desire to review the ruling of the court upon the application, the affidavits and evidence upon which it was heard must be preserved by a bill of exceptions. *Mason v. Ray*, 6 Neb., 101.

No review can be had until after final judgment, and the objection should be made in the motion for a new trial.

If the application is overruled the costs attending it should be taxed to the party filing the motion.

Form of Order.

[Title of Cause.]

It appearing to the satisfaction of the court from the evidence submitted in this case that a fair and impartial trial cannot be had in.....county, it is therefore ordered that the place of trial of said cause be and the same is hereby changed to.....county.

The clerk of this court is therefore directed to transmit to the clerk of the district court of said county the pleadings and proceedings in the case and a certified copy of this order.

CHAPTER VI.

MANNER OF COMMENCING CIVIL ACTIONS.¹

Section 62. A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.

Section 63. The plaintiff shall also file with the clerk of the court a precipe, stating the names of the parties to the action and demanding that a summons issue thereon.

Section 64. The summons shall be issued by the clerk, shall

¹ 1 Code, Title V.

be under the seal of the court from which the same shall issue, and shall be signed by the clerk. Its style shall be "The State of Nebraska,.....county," and it shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants named therein that he or they have been sued, and must answer the petition filed by the plaintiff [*giving his name*] at the time stated therein, or the petition will be taken as true, and judgment rendered accordingly. And where the action is for the recovery of money only there shall be endorsed on the writ the amount to be furnished in the precipe, for which, with interest, judgment will be taken if the defendant fail to answer. If the defendant fail to appear judgment shall not be rendered for a larger amount and costs.

Section 65. When the action is rightly brought in any county, according to the provisions of title form, a summons shall be issued to any other county, against any one or more of the defendants, at the plaintiff's request.

Section 66. Whenever the time for bringing parties into court is not fixed by statute the summons shall be returnable on the second Monday after its date, but when issued to any other county than the one in which the action is brought it may be made returnable, at the option of the party having it issued, on the third or fourth Monday after its date. It shall state the day of the month on which it is returnable.

Section 67. When a writ is returned "not summoned" other writs may be issued, until the defendant or defendants shall be summoned; and when defendants reside in different counties writs may be issued to such counties at the same time.

Form of Precipe.

In the District Court of.....county, Nebraska.

A. B.	}
v.	
C. D. and E. F.	

To the clerk of said court:

You will issue summons in this case for C. D., returnable, 18..., and also a summons for E. F., of.....county, return-

able....., 18... The plaintiff prays judgment for \$....., with interest, from the.....day of....., 18...
January 1, 18...

R. O., *Attorney for Plaintiff.*

If there are minor defendants state their ages, as near as may be, in the precipe.

Return day. In *Crowell v. Galloway*, 3 Neb., 215, the summons was made returnable on the *first* Monday after its date; it was held that no discretion is vested in either the clerk or the court in respect to the return and answer days, and that the defendant in such case has a right to appear for that purpose and challenge the jurisdiction of the court over him. The motion, however, should be to quash the summons, not to dismiss the action.

Form of Summons.

THE STATE OF NEBRASKA,..... COUNTY.

To the sheriff of said county:

You are hereby commanded to notify C. D. and E. F. that they have been sued by.....in the district court of..... county, and must answer by the.....day of....., 18..., the petition of.....plaintiff, filed against them in the clerk's office of said court, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on or before the day of....., 18....

Witness my hand and the seal of said court this.....day of , 18...

[L. S.]

L. M., *Clerk.*

If issued by a deputy it may be in this form:

L. M., *Clerk.*

By N. O., *Deputy Clerk.*

Indorsement on the Writ.

If the defendant fail to appear the plaintiff will take judgment for the sum of \$....., together with interest at...per cent thereon, from the.....day of....., 18...

L. M., *Clerk.*

No other judgment can be rendered than that notice of which is indorsed on the summons. *Watson v. McCartney*, 1 Neb., 131.

If a summons, issued in an action of such a character as does not require an indorsement, be actually indorsed, the notice so given must fully and truthfully inform the defendant of the extent and nature of the claim alleged against him. *Id.*

In the case above cited the plaintiff prayed in his petition for a judgment for \$1600, and the enforcement of a vendor's lien upon certain real estate. The indorsement on the summons was as follows: "The plaintiff in this action claims judgment for the sum of \$1600, together with interest thereon from the first day of April, A.D. 1867, at the rate of ten per cent per annum." It was held (the defendant not appearing) that no other judgment could be rendered than for money only. It was also held that if the summons was amended a copy of the amended summons must be served on the defendant.

An action for the recovery of money only is one where it is sought to reduce a claim to judgment upon which an execution may issue and be levied upon any property of the defendant not exempt. *Jones v. Null*, 9 Neb., 59.

The failure of the clerk to indorse the amount of the plaintiff's demand on the summons is of no consequence *unless the defendant fail to appear*. *Crowell v. Galloway*, 3 Neb., 219.

Section 64 provides for the indorsement on the writ in all cases where the action is for the recovery of money only—that is, where no other relief is sought than a judgment for money. In all such cases the amount claimed should be indorsed on the summons. When the action is in equity ordinarily no indorsement is necessary.

SERVICE OF SUMMONS. ACTUAL SERVICE.

Section 68. The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may also be served by any person not a party to the action, appointed by the officer to whom it is directed. The authority of such person shall be indorsed on the writ.

Appointment of Private Person to Serve Summons.

I hereby appoint and authorize.....to serve the within summons..... Dated....., 18...

.....*Sheriff*.

When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of this state, the return must be verified by oath or affirmation.

Section 69. The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence, at any time before the return day.

Section 70. *In all cases* the return must state the time and manner of service.

Section 71. The officer to whom the summons is directed must return the same at the time therein stated.

Section 72. *An acknowledgment* on the back of the summons or the voluntary appearance of the defendant, is equivalent to a service.

Oath of Service of Summons.

THE STATE OF NEBRASKA, }
.....COUNTY. }

I.....do solemnly swear that on the.....day of....., 18... I summoned the within named.....by delivering to him a certified copy of this writ and of the indorsement thereon.....

Subscribed in my presence and sworn to before me this.... day of....., 18....

E. F., *Justice of the Peace (or Clerk)*.

Section 73. *A summons against a corporation* may be served upon the president, mayor, chairman of the board of directors or trustees, or other chief officer; or if its chief officer is not found in the county, upon its cashier, treasurer, secretary, clerk, or managing agent; or if none of the aforesaid officers can be found, by a copy left at the office or usual place of business of such corporation.

Section 74. *When the defendant is an incorporated insurance company*, and the action is brought in a county in which there is an agency thereof, the service may be upon the chief officer of such agency.

Section 75. *When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent.*

Section 76. *When the defendant is a minor under the age of fourteen years, the service must be made upon him, and upon his guardian or father; or if neither of these can be found, then upon his mother, or the person having the care or control of the infant, or with whom he lives. If neither of these can be found, or if the minor be more than fourteen years of age, service on him alone will be sufficient. The manner of service may be the same as in case of adults.*

The words "usual place of residence" mean the place of abode at the time of service. Blodgett v. Utley, 4 Neb., 30.

If a party is temporarily absent from the state service may be made by leaving a copy of the summons at his usual place of residence. But if he has gone away with the intention of remaining for an indefinite time, service cannot be made upon him by leaving a copy of the summons at the residence of his family, it not being his usual place of residence.

Acknowledgment of Service.

I acknowledge service of the within summons.

Jan. 1, 1880.

C. D.

A general appearance waives all defects in the summons and mode of service.

Forms of Returns.

Jan 1, 18..... Received writ.

As herein commanded I, on the....day of....., 18..., summoned the said.....by delivering to each of said defendants a certified copy of this summons and of the indorsement thereon.

Dated....., 18...

Fees,

G. H., Sheriff.

When there are two or more defendants who are not served on the same day the return must show the day each was served.

In such case the return may be as follows:

As herein commanded I summoned the said defendants by delivering to.....a certified copy of this writ and of the in-

dorsement thereon, on the....day of....., 18..., and to.....
on the.....day of....., 18...

When one or more of the defendants are not found, after inserting in the return the names of those summoned, add:are not found in.....county.

Infant Under Fourteen Years of Age.

Jan. 1, 18... Received writ.

As herein commanded I, on the.....day of....., 18..., summoned the said....., a minor under the age of fourteen years, by delivering to him a certified copy of this writ and of the endorsement thereon, and on the same day I delivered a certified copy thereof, and of the indorsement thereon to.....[*the guardian, father, mother, or person with whom the minor is living, as the case may be*].

If the summons is not served on the guardian, father, mother or person with whom the minor is living, the return should show that such persons nor any of them could be found. In such case service on the minor himself is sufficient.

If the minor is over the age of fourteen years service on him alone is sufficient.

Service on Corporation.

Jan. 1, 18... Received writ.

As herein commanded I, on the.....day of....., 18..., summoned the defendant named herein, by delivering a certified copy of this writ and of the indorsement thereon to.....the president [*or mayor, or chairman of the board of trustees, or chairman of the board of directors, or designation of the officer served and say:*], chief officer of the within named corporation; [*or if the chief officer is not found in the county, then describe the officer upon whom the writ is served according to his office, as cashier, treasurer, secretary, clerk, or managing agent*], no chief officer of said corporation being found within the county.

Service on Subordinate Officer of Corporation.

Jan. 1, 18... Received writ.

As herein commanded I, on the.....day of.....18..., summoned the within named defendant by delivering to.....,

cashier [*treasurer, secretary, clerk or managing agent*] thereof, a certified copy of this writ and of the indorsement thereon, the chief officer of said corporation not being found in the county.

Service where none of the Officers are found.

Jan. 1, 18... Received writ.

The president, etc., treasurer, cashier, secretary, clerk, or managing agent of the within named corporation not being found in my county; I on the.....day of....., 18..., summoned the within named defendant by leaving a certified copy of this writ and of the indorsement thereon, at the office [*or usual place of business*] of said corporation with R. G., the person having charge of said office.

On Agent of Insurance Company.

Jan. 1, 18... Received writ.

As herein commanded, I, on the.....day of....., 18..., summoned the within named defendant by delivering to....., chief officer of the agency of said company in.....county, Nebraska, a certified copy of this writ and of the indorsement thereon.

Service upon Company or Firm.

Jan. 1, 18... Received writ.

As herein commanded, I, on the.....day of....., 18..., summoned the within named defendant by delivering to....., a member of said firm [*or clerk or general agent thereof*] at their usual place of business in.....county, Nebraska, a certified copy of this writ and of the indorsement thereon.

Service on Foreign Corporation.

Jan. 1, 18... Received writ.

As herein commanded, I, on the.....day of....., 18..., summoned the within named defendant by delivering to....., managing agent of said corporation in.....county, Nebraska, a certified copy of this writ and of the indorsement thereon.

Managing Agent. An agent who is invested with the general conduct and control at a particular place of the business of a corporation is a managing agent within the meaning of the

seventy-fifth section of the code. It is immaterial where he resides. *Porter v. The C. & N. W. R. W. Co.*, 1 Neb., 15. *American Ex. Co. v. Johnson*, 17 O. S., 641.

Husband and wife. Process against and service on the husband alone, in an action to foreclose a mortgage signed by the husband and wife, does not effect the wife's appearance in the action. *McArthur v. Franklin*, 15 O. S., 485.

Service upon infants. A return of the sheriff that he has served the summons on the infant alone is insufficient, unless it is accompanied with a statement that there could be found no guardian, father, mother, or person having the care of the infant, or with whom he lived, or that the infant is over fourteen years of age. *Keys v. McDonald*, 1 Handy, 287.

It is not proper for the attorney of the plaintiff to acknowledge service of process for the defendant, and thereby bring him into court. And the court in such case will refuse to enter up judgment. *Sleeper v. Sleeper*, 1 Handy, 530.

A summons served by leaving a true copy at the residence of the party named is sufficient; as residence and usual place of residence are equivalent terms. *Walker v. Bank of Circleville*, 15 O., 288.

Appearance. If after judgment by default against a defendant, not within the jurisdiction of the court, because of defective service of summons, the defendant appear in court to give notice of appeal, and has it entered on the record, he thereby appears in the action and submits to the jurisdiction of the court. *Fee v. Big Sand Iron Co.*, 13 O. S., 563. *Cropsey v. Wiggenghorn*, 3 Neb., 108. *Crowell v. Galloway*, Id., 220. *Kane v. The People*, 4 Id., 512.

Appearance. A defendant by pleading to the action thereby enters his appearance in the case, and is estopped from denying the service of process, unless the authority by which this is done can be impeached. *Evans v. Iles*, 7 O. S., 233.

CONSTRUCTIVE SERVICE.

Section 77. Service may be made by publication in either of the following cases:

First. In actions brought under the fifty-first, fifty-second, and fifty-third sections of this code, where *any* or *all* of the defendants reside out of the state.

Second. In actions brought to establish or set aside a will, where any or all of the defendants reside out of the state.

Third. In actions brought against a non-resident of this state or a foreign corporation, having in this state property or debts owing to them, sought to be taken by any provisional remedy, or to be appropriated in any way.

Fourth. In actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and said defendant is a non-resident of this state or a foreign corporation.

Fifth. In all actions where the defendant, being a resident of the state, has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid the service of summons, or keeps himself concealed therein with the like intent.

Section 78. *Before service can be made by publication, an affidavit must be filed that service of summons cannot be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication.*

Section 79. *The publication must be made four consecutive weeks in some newspaper printed in the county where the petition is filed, if there be any printed in such county; and if there be none, then in some newspaper printed in the state of general circulation in that county. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer.*

Section 80. *Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section, and such service shall be proved by the affidavit of the printer, or his foreman or principal clerk, or other person knowing the same.*

Section 81. In all cases where service may be made by publication, and in all other cases where the defendants are non-resi-

dents, and the cause of action arose in this state, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the state by the sheriff or some person appointed by him for that purpose. In all cases where service of a summons is made on a person without the state proof of such service must be made by affidavit, stating the *time* and *manner* of service, and such service shall be made in the same manner as summonses are served on parties residing within the state.

Section 82. A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within five years after the date of the judgment or order, have the same opened and be let in to defend; before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court by affidavit that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided in this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense.

Section 83. *Unknown heirs or devisees.* In actions where it shall be necessary to make the heirs or devisees of any deceased person defendants, and it shall appear by the affidavit of the *plaintiff* annexed to his petition that the names of such heirs or devisees, or any of them, and their residences, are unknown to the plaintiff, proceedings may be had against such unknown heirs or devisees without naming them, and the court may make such order respecting service as may be deemed proper; if ser-

vice by publication be ordered the publication shall not be less than four weeks.

Section 84. *Where the action is against two or more defendants, and one or more shall be served, but not all of them, the plaintiff may proceed as follows :*

First. If the action is against defendants jointly indebted upon contract he may proceed against the defendant served unless the court otherwise direct.

Second. If the action be against defendants severally liable he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants.

Section 85. *When the summons has been served or publication made the action is pending so as to charge third persons with notice of its pendency, and while pending, no interest can be acquired by third persons in the subject matter thereof as against the plaintiff's title.*

Section 86. *Notice.* When any part of the real property, the subject of the action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the clerk's office of such other county or counties before it shall operate therein as a notice so as to charge third persons as provided in the preceding section. It shall operate as such notice without record in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute now in force which does not require such record.

Service by publication is of no validity in cases where a person or corporation, owning or claiming any interest in or lien upon real estate, shall appoint an agent on whom to serve process, as provided in the act "In relation to service of process in certain actions concerning real estate," approved Feb. 15, 1877. Laws of 1877, 17.

Affidavit for Service by Publication.

In the District Court of.....County, Nebraska.

A. B., plaintiff, }
v.
C. D., defendant. }

A. B., plaintiff in the above entitled action, being first duly

sworn, deposes and says: that on the.....day of....., 18..., he filed a petition in the district court of.....county against C. D. and E. F., the object and prayer of which is [to foreclose a certain mortgage executed by the defendants to the plaintiff upon (describe the premises) to secure the payment of.....promissory notes dated.....18..., for the sum of.....each, and due and payable in.....years from date thereof, that there is now due upon said notes and mortgage the sum of \$....., and plaintiff prays that said premises may be decreed to be sold to satisfy the amount due thereon]. Affiant further states that said defendants are non-residents, and service of summons cannot be made within this state upon either of them, wherefore plaintiff prays for service upon said defendants by publication.

A. B.

Subscribed in my presence, and sworn to before me, this.... day of....., 18....

[L. s.] Clerk of the District Court.

The affidavit is jurisdictional, and it should show the existence of one of the causes of action set forth in section 77 of the code or the court will acquire no jurisdiction by the publication. *Atkins v. Atkins*, 9 Neb., 191. *Shields v. Miller*, 9 Kansas, 390. *Slocum v. Slocum*, 17 Wis., 150. *Forbes v. Hyde*, 31 Cal., 342.

The rule may be stated thus: If there is a total want of evidence upon a vital point in the affidavit the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state a material fact, but it is insufficiently set forth, the proceedings are merely voidable. *Atkins v. Atkins*, 9 Neb., 191.

Form of Notice.

C. D. and E. F., defendants, will take notice that on day of, 18..., A. B., plaintiff herein, filed his petition in the district court of county, Nebraska, against said defendants, the object and prayer of which are [to foreclose a certain mortgage executed by the defendants to the plaintiff upon (describe premises) to secure the payment of certain promissory notes dated, 18..., for the sum of \$..... each, and due and payable in years from the date thereof; that there is now due upon said notes and mortgage the sum of \$....., for which sum, with interest from this date,

plaintiff prays for a decree that defendants be required to pay the same, or that said premises may be sold to satisfy the amount found due]. You are required to answer said petition on or before the day of, 18....

Dated,, 18....

A. B., *Plaintiff*,

By S. H., *Attorney*.

The statute requires the notice to be published four consecutive weeks. This requirement is satisfied by four successive weekly publications. *Miller v. Finn*, 1 Neb., 254. *Bachelor v. Bachelor*, 1 Mass., 255. *Sheldon v. Wright*, 3 Selden, 497. *Olcott v. Robinson*, 21 N. Y., 150. *Sheldon v. Wright*, 7 Barb., 39.

Notice to non-resident defendants by publication should contain a pertinent description of the property sought to be affected. *Lawler v. Whetts*, 1 Handy, 39.

If the notice is so specific as to advise the defendants of the nature of their interest sought to be affected by the proceeding, it is sufficient. *Gary v. May*, 16 O., 66.

The defendant is required to answer on or before the third Monday after the day of the fourth or last publication. The notice should state the day and date when the answer must be filed.

The right to make personal service of summons out of the state is limited to cases where service by publication may be made. *Vallette v. Kentucky Trust Co. Bank*, 2 Handy, 1.

Specific performance. The provision of the Code authorizing suits for specific performance of contracts for real estate to be brought in the county where the defendants or any of them reside, is limited to land situate within the state. *Penn v. Hayward*, 14 O. S., 302. *Roberts v. Swearingen*, 8 Neb., 372.

Notice of Application to Open Judgment.

In the District Court of.....County, Nebraska.

A. B., }
v. }
C. D. }

To A. B.:

Your are hereby notified that I will apply to the district court of.....county, on the first day of the next term thereof, or as soon thereafter as the application can be heard, to have the

judgment heretofore rendered in this cause opened up and be let in to defend the same.

Dated.....18...

C. D.,

By S. H., *his Attorney.*

A copy of the notice should be filed in the district court, upon which should be indorsed the oath of the party serving the same, showing the time and manner of service.

The application may be made as a matter of right, and when a party brings himself clearly within the statute the court has no discretion in the matter, but must grant the application; but it may require the payment of costs to that time as a condition.

ORDER OPENING JUDGMENT.

This cause came on for hearing, after due notice to the plaintiff, upon the motion of the defendant to open the judgment heretofore rendered in this action, and after hearing the evidence and the arguments of counsel the court finds that no other service upon the defendant was had in this case than by publication in the [*name of paper*]. And it appearing to the satisfaction of the court by the evidence, that during the pendency of the action the said defendant had no actual notice thereof, and that he has a defense to the same, it is therefore considered that the judgment heretofore rendered in this case be and the same is hereby set aside, and he be permitted to answer upon payment by him of all costs to this date.

UNKNOWN HEIRS AND DEVISEES.

Affidavit of Plaintiff Annexed to his Petition.

THE STATE OF NEBRASKA, }
.....COUNTY. }

A. B., plaintiff in the above entitled action, being first duly sworn, deposes and says that the names of the heirs [*or devisees*] of said named in the above petition, or any of them, and their residences, are unknown to the said A. B., plaintiff.

A. B.

Subscribed in my presence and sworn to before me this day of, 18....

.....Clerk of the District Court.

Order for Publication.

On motion of A. B., by, his attorney, and it appearing to the court from the affidavit of the plaintiff annexed to his petition that the names of the heirs [*or devisees*] of the said, or any of them, and their residences, are unknown to said plaintiff, it is therefore ordered that, as to them, service be made for four consecutive weeks in the same manner as in case of non-resident defendants. The notice to contain a summary statement of the object and prayer of the petition.

Affidavit of Publication.

THE STATE OF NEBRASKA, }
 COUNTY. }

L. M., being first duly sworn, deposes and says: that he is the printer [*or foreman or principal clerk*] of [*insert name of paper*], a newspaper printed and published in said county; that the annexed notice was published in said paper for four consecutive weeks, the first publication being on day of, 18....

L. M.

Subscribed in my presence and sworn to before me this day of, 18....

....., Clerk [*or Justice of the Peace*].

CHAPTER VII.

PLEADINGS IN CIVIL ACTIONS.

Section 91. *The only pleadings allowed are—*

First. The petition by the plaintiff.

Second. The answer or demurrer by the defendant.

Third. The demurrer or reply by the plaintiff.

Fourth. The demurrer to the reply by the defendant.

The pleadings at common law were:

1. The declaration.
2. The plea.
3. The replication.
4. The rejoinder.

5. The surrejoinder.
6. The rebutter.
7. The surrebutter.

The declaration stated the plaintiff's cause of action, and was not in general filed until service had been made on the defendant. In case the defendant did not demur to the declaration he could answer it by a plea denying generally the declaration to be true. This was called the general issue. Or he could allege new matter in abatement or avoidance of the plaintiff's claim. To these defenses the plaintiff might demur, or deny the facts stated therein, or allege new matter constituting a defense. This pleading of fact was called a replication. The defendant might demur to the replication, or file a rejoinder denying the facts stated therein. To this the plaintiff could file a surrejoinder, to which the defendant could file a rebutter. To this the plaintiff could answer by a surrebutter. The same count in a declaration could not contain more than one cause of action, neither could a plea contain more than one defense. The object was to frame pleadings so as to present but a single issue, either of law or fact. Under the general issue in an action of assumpsit, many defenses, such as payment, could be proved. The whole system had become exceedingly technical, and it is apparent, from the reported cases, made the regularity of the proceedings of more importance than the rights of the parties.

CHAPTER VIII.

THE PETITION.

Section 92. The petition must contain—

First. The name of the *court* and *county* in which the action is brought, and the names of the parties plaintiff and defendant.

Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.

Third. A demand for the relief to which the party supposes himself to be entitled. If the recovery of money be demanded the amount thereof shall be stated; and if interest thereon be claimed the time from which interest is to be computed shall also be stated.

Section 93. Where the petition contains more than one cause of action, each shall be separately stated and numbered.

If pleadings shall be in ordinary language, as contradistinguished from legal technical language, they must be construed as meaning what is generally understood by ordinary language, and hence there can be no established technical mode of stating a cause of action or defense. *Trustees v. Odlin*, 8 O. S., 297.

Motion to make specific. If what, under common law pleadings, was denominated a legal deduction or conclusion of law is alleged, it may or may not contain also a fact constituting a cause of action or defense; but if it does, and is indefinite and uncertain, the opposite party may by motion require it to be made definite. He cannot demur on that ground, nor object to the pleading on error. *Id. Mills v. Rice*, 3 Neb., 87.

The code does not authorize the same cause of action to be stated in different forms as so many distinct causes of action. It wholly abolishes this artificial mode of pleading. But if the petition contains a full statement of the facts constituting the plaintiff's cause of action, and this is improperly followed by another count differing from the former only in being more general in

its form and less specific in its statement of facts, and no objection is taken to the petition, the second count may be rejected as mere surplusage. *Ferguson v. Gilbert*, 16 O. S., 88. *Lash v. Christie*, 4 Neb., 262.

In an action to recover a personal judgment for the amount of an assessment for the improvement of streets it must appear that the defendant was the owner of the lot at the date of the assessment. *Corry v. Gaynor*, 21 O. S., 277.

Under the liberal construction of pleadings prescribed by the code, and no motion being made to require the pleading to be made more definite and certain, an averment in the petition that the guarantor is liable both as an indorser and guarantor implies a transfer of the note to the guarantee, and imports a consideration for the contract of guaranty. *Clay v. Edgerton*, 19 O. S., 549.

When the condition of a bond requires a compliance with the terms of another obligation, which are not fully stated in the condition, a declaration upon the bond must set out the obligation referred to in the condition, with a corresponding breach. *Portage Canal and Manufacturing Co., v. Crittenden*, 17 Ohio, 436. *Clarke v. O. & S. W. R. W. Co.*, 5 Neb., 314.

In an action on contract a petition is bad on general demurrer if it fail to aver a breach of the contract. *Phipps v. Hope*, 16 O. S., 586.

All contracts in general restraint of trade are opposed to public policy, and void; and those impartial restraints are illegal, except when founded upon a valuable consideration, and when good reasons appear for entering into the contract. *Lange v. Werk*, 2 O. S., 520.

Before such contract can be enforced it must appear from the pleadings and proofs: 1. That the restraint is partial. 2. Founded upon a valuable consideration. And 3. That the contract is reasonable and not oppressive. It should appear from the facts stated in the petition that the contract is reasonable. *Id.*

A contract may be reformed and final judgment rendered thereon in the same action. *Stewart v. Carter*, 4 Neb., 566. *Globe Ins. Co. v. Boyle*, 21 O. S., 120.

Covenants. If the liability of the defendant depends upon the performance of a prior covenant or condition on the part of the plaintiff, performance, or a tender of performance, must be averred, or the declaration will be bad on demurrer. *Courcier v. Graham*, 1 Ohio, 342.

Covenant. If the covenant contain mutual conditions to be performed at the same time the plaintiff must aver that he was ready and offered to perform on his part. *Id.*

Covenant of warranty. The petition in an action on a covenant of warranty in a deed must aver an eviction by paramount title to entitle the plaintiff to recover. *Innes v. Agnew*, 1 Ohio, 387. *Mills v. Rice*, 3 Neb., 76.

It is not sufficient to merely negative the words of the covenants, for these covenants protect only against an ouster from the possession or enjoyment of the premises. *Mills v. Rice*, 3 Neb., 85.

Mutual covenants. A covenant to convey a tract of land, specifying no time of conveyance, and a covenant to pay therefor so much money in hand, and so much at a future day, are mutual covenants, and the purchaser cannot have a cause of action without averring the payment or tender of the purchase money. *McCoy v. Bixbee*, 6 Ohio, 310.

Fraud. A petition to impeach a contract judgment or decree for fraud must set forth the circumstances which constitute the fraud particularly and precisely. *Pendleton v. Galloway*, 9 Ohio, 178. *Arnold v. Baker*, 6 Neb., 134. *Clark v. Dayton*, *Id.*, 192.

New promise. Where a new promise or acknowledgment has been made, the plaintiff may state the barred demand as a consideration for the new promise, and allege the new promise in writing as the cause of action. *Sturges v. Burton*, 8 O. S., 221.

New promise. Under a count framed on an executed consideration, and averring an original indebtedness, and a subsequent promise in consideration thereof, but failing to aver that the claim had ever been barred by the statute of limitations, evidence will be admitted that the claim was barred, but taken out of the statute by a subsequent promise. *Exrs. of Haymaker v. Haymaker*, 4 O. S., 273.

Malicious prosecution. An averment that the defendants had without cause falsely and maliciously made written complaint before a justice of the peace charging the plaintiff with having embezzled and destroyed letters in the United States mail entrusted to him as mail carrier, and procured a warrant to be issued by said justice for his arrest, returnable before a United States commissioner, and caused him to be prosecuted on such charge; and that the commissioner, on hearing, found that there was no cause of complaint, and that he was discharged by said commissioner, by which he was greatly injured in his reputation, etc., constitutes a cause of action. *Tilton v. Morgaridge*, 12 O. S., 98.

Not ground of demurrer. Where a petition states a good cause of action, the mere failure to show that it accrued within the period limited by statute for bringing the action, is not a good ground of demurrer. *Huston v. Craghead*, 23 O. S., 198. *Mills v. Rice*, 3 Neb., 76.

Mechanic's lien. A mechanic's lien cannot be created upon the real estate of a married woman for work or materials furnished in erecting a house thereon under a contract with her husband, unless it is alleged and proved that the work was done or the materials furnished under a contract with the wife. *Spinning v. Blackburn*, 13 O. S., 131.

But if the wife give directions and instructions to the workmen as to the kind and character of dwelling to erect, and the manner in which the work shall be done, in the absence of counteracting proof it will be presumed the husband acted as the agent of the wife in entering into such contract. *McCormick v. Lawton*, 3 Neb., 452.

Official bond. Where in an action on an official bond the petition by suitable averments shows affirmatively that the act complained of was done by the officer while in the performance of an official duty, it is not subject of demurrer because of an additional averment that it was done under color of his said office. These latter words may be rejected as surplusage. *Huffman v. Kopplekom*, 8 Neb., 344.

Where there is an omission to state a material fact in a petition—one necessary to show a cause of action, the presumption

is that it does not exist. *B. & M. R. R. v. York Co.*, 7 Neb., 487. *B. & M. R. R. v. Lancaster Co.*, 4 Id., 307.

Replevin. The general averments in a petition in replevin that the plaintiff "has a special property in the goods, that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him," are mere propositions of law. *Curtis v. Cutler*, 7 Neb., 315.

Administrator's bonds. In an action on an administrator's bond against the surviving obligors and the administratrix of a deceased surety, if the case does not fall within the exceptions provided for in the statute, no action can be maintained thereon until the expiration of the time limited for the collection of the assets and paying debts, and if the petition does not show such lapse of time a demurrer will lie. *Hammerle v. Kramer*, 12 O. S., 252.

Subscription contract. In an action on a railroad subscription contract, conditioned to be paid in installments as might from time to time be called for by the directors, provided the same be expended upon a certain line of road to be thereafter located by the company, *Held*, that a petition, showing neither the road constructed along the line designated, nor an offer nor readiness to expend the money subscribed according to the condition, is defective. *Trott v. Sarchett*, 10 O. S., 242.

Action for installments. In an action for installments of stock which are payable at the requisition of the directors and on publication of notice, the facts of requisition and publication must be set forth with convenient certainty of time and place. *Penn. & Ohio Canal Co. v. Webb*, 9 Ohio, 136.

Nuisance. Where a declaration charges a railroad company with obstructing a public street adjoining the residence of plaintiff, and thereby prevented a free passage to and from his dwelling house, that the company kept up dangerous fires, generated and deposited about his premises noxious vapors and smoke, jarred and disjointed his house, made his residence unwholesome and uncomfortable, and that the railroad company did these things *unlawfully* and with the intent to injure plaintiff, a good cause of action is shown. *Parrot v. Railroad Co.*, 3 O. S., 330.

Assault and battery. In an action for assault and battery the

plaintiff may introduce evidence showing express malice without averring in his petition that the assault was malicious. *Klein v. Thompson*, 19 O. S., 569.

In an action on an undertaking in attachment the petition should allege that the order of attachment was *wrongfully* sued out or obtained. It is not enough to state in the petition that the attachment was quashed and the property released by proceedings in error. *Eaton v. Bartscherer*, 5 Neb., 469.

An action to foreclose a tax lien will not lie until the expiration of the two years allowed the owner to redeem the land, nor until there is a failure of the title acquired by the tax deed. *Peet v. O'Brien*, 5 Id., 360.

Against vendor. Where a vendor elects to put an end to the contract for the sale of real estate the vendee may recover back the amount he has paid in part performance thereof. *Eaton v. Redick*, 1 Neb., 308.

Against road supervisor. An action cannot be maintained against a road supervisor by an individual for an injury to his person or property occasioned by a defect in a public road or bridge. *McConnell v. Dewey*, 5 Id., 385.

Separately stating and numbering causes of action. When the plaintiff has but one cause of action the facts cannot be subdivided so as to present fictitiously two or more causes of action. *Sturges v. Burton*, 8 O. S., 215.

Not demurrable. A pleading under the code which sets up two or more causes of action, or two or more defenses, but omits to separately state and number them, is not for that reason demurrable. The irregularity can be reached only on motion. *The Township of Hartford v. Bennett*, 10 O. S., 441. *Lash v. Christie*, 4 Neb., 262.

Where two or more causes of action are properly joined but not separately stated or numbered in the petition, and the defendant, without objection, by motion answers both and proceeds to trial, he waives the objection. *McKinney v. McKinney*, 8 O. S., 423.

Separate causes of action. A claim for damages for withholding real property and the rents and profits thereof may be united with a claim to recover possession of the same, but they are sep-

arate causes of action and should be separately stated and numbered in the petition. *McKinney v. McKinney*, 8 O. S., 429.

Where the cause of action is so stated in the petition that the defendant cannot demur, on the ground that the claim is barred by the statute of limitations, he should plead the statute in bar, otherwise he waives the defense. *Id. Vore v. Woodford*, 29 Id., 245. *Towsley v. Moore*, 30 Id., 184.

One cause of action. A petition stating that the defendant sold to the plaintiff a specified number of sheep, representing them to be sound when they were not sound, but all or a part of them were affected with hoof-rot, and that, relying upon defendant's representation as true, the plaintiff turned the sheep into his field with his other sheep, whereby they also became diseased and the pasture injured, does not state several causes of action, but only a single cause of action with circumstances of special damage. *Wilcox v. McCoy*, 21 O. S., 655.

In an action of slander. Where certain actionable words were charged in the petition to have been spoken of the plaintiff, on a day named and at sundry other times between that day and the commencement of the suit, *Held*, in the absence of a motion to separately state the different causes of action or make them more definite as authorized by the code, any utterance of the words by the defendant between the day named in the petition and the commencement of the suit may be considered as ground for the recovery of damages, but words spoken after the commencement of the suit are only admissible for the purpose of proving malice, and cannot be relied on as a ground of recovery. *Alpin v. Morton*, 21 O. S., 536.

Prayer for relief. The plaintiff in his petition must pray for such relief as he supposes himself entitled to. In equity causes, in addition to the specific relief prayed for, it is well to add a prayer for general relief.

A good petition must contain a cause of action in favor of the plaintiff, and where it does not show such cause of action the objection is not waived by the failure of the defendant to demur, although the facts stated may constitute a cause of action in favor of a person not a party to the suit. *Weidner v. Rankin*, 26 O. S., 522. *Hurley v. Cox*, 9 Neb., 230.

In an action on an executor's bond, as against a demurrer to the petition, it is sufficient allegation of breach to set forth the condition of the bond alleged to have been broken, and aver a non-performance of such condition, although the petition might be open to a motion to make more definite and certain. *Gutridge v. Vanatta*, 27 O. S., 366.

Copies of written instruments attached to and filed with the petition, as required by the code, form no part of the pleading. *Larrimore v. Wells*, 29 O. S., 13.

Limitation waived. Where a petition, which contains a good cause of action, except that it appears to be barred by the statute, is demurred to, and the defendant afterwards, pending the demurrer, answers to the merits, and an issue of fact is joined thereon and trial had, the demurrer must be taken to have been waived. *Vore v. Woodford*, 29 Id., 245.

A petition against several makers of a joint and several promissory note more than fifteen years past due, whereon payments have been made within the time of the statute, but by whom paid not appearing, does not show a statutory bar in favor of any of the defendants. *Id.*

In such case the makers in whose favor the statute has run should plead the statute in bar.

A petition in a civil action, however inartistically drawn, but containing facts sufficient if properly stated to constitute a cause of action, will support a judgment entered on a general verdict in favor of the plaintiff when no objection is made to the sufficiency of the petition before judgment. *Youngstown v. Moore*, 30 Id., 133.

Plaintiff having more than one lien. The plaintiff in a proceeding in foreclosure, having more than one valid lien upon the premises, will be protected only to the extent he sets them up and asks relief; and if he has a subsisting judgment lien at the time he commences his action, and fails to set the same up in his petition, and such judgment, pending the proceedings, becomes dormant, the plaintiff cannot afterwards set the same up by amendment, and have it enforced against the liens of other parties in the case. *Fork v. Litmer*, 31 Id., 215.

Facts must be stated. When an injunction is sought on the

ground of apprehended injury to real property facts must be stated showing that the injury would be irreparable, and the mere statement in the petition that the injury would be irreparable is insufficient on demurrer. *Van Wert v. Webster*, Id., 420. *Normand v. Otoe Co.*, 8 Neb., 18.

Facts must be stated. In an action to recover damages resulting to domestic animals from the failure of a railroad company to construct and maintain good and sufficient fences along the line of its road as required by the statute, the facts upon which the company's liability depends must be stated in the petition. *Railroad v. Wilson*, 31 O. S., 555.

A petition in the following form was held sufficient: "The plaintiff says this, his action, is founded on a promissory note, of which the following is a copy, with the indorsements thereon:

"\$296.47.

"STEUBENVILLE, O., January 19, 1855.

"Fifty days after date the Steubenville and Indiana Railroad Company promise to pay to Jesse Sweitzer, or order, two hundred and ninety-six dollars and forty-seven cents, for value received. In witness whereof the president of said company hereby affixes his signature.

"\$296.47.

"JAMES MEANS,

"President of S. & I. R. R. Co.

"For value received we guarantee the payment of the within note.

"LEVI SARGENT,

"ISAAC CARR.

"January 15, 1855.

"There are no credits on said note. There is due from the defendant to the plaintiff on said note the sum of two hundred and ninety-six dollars and forty-seven cents, which he claims, with interest from the 12th day of March, 1855, and for which he prays judgment against the defendant." *Sargent v. Railroad*, 32 O. S., 449.

If the defective condition of leased premises occasions damage, in order to make the lessor or landlord responsible it is not sufficient merely to allege ownership in him, but the special circumstances creating his liability must be stated. *Shindlebeck v. Moon*, Id., 264.

Finding not conclusive, when. In an action on a written instrument against two or more persons jointly and severally bound, the finding of the court, under section 449 of the code [section 511 of the code of Nebraska], that one or more of the makers signed the same as surety or bail for his or their co-defendant, and the certificate in the judgment showing which is principal and which are sureties, do not conclude the parties as to the facts so found and certified in an action subsequently instituted for contribution. *Gatch v. Simkins*, 25 O. S., 89.

Discovery under the code has ceased to be one of the objects sought in a court of equity. Jurisdiction cannot therefore be maintained on that ground alone. *Lamaster v. Scofield*, 5 Neb., 148.

CHAPTER IX.

THE DEMURRER.

Section 94. The defendant may demur to the petition only when it appears on its *face*, either—

First. That the court has no jurisdiction of the person of the defendant or the subject of the action.

Second. That the plaintiff has not legal capacity to sue.

Third. That there is another action pending between the same parties for the same cause.

Fourth. That there is a *defect* of parties, plaintiff or defendant.

Fifth. That several causes of action are improperly joined.

Sixth. That the petition does not state facts sufficient to constitute a cause of action.

Section 95. *The demurrer shall specify distinctly the grounds of objection to the petition.* Unless it do so it shall be regarded as objecting only that the petition does not state facts sufficient to constitute a cause of action.

Objections not taken by demurrer or answer waived. When any of the defects enumerated in section 94 do not appear on the face

of the petition the objection may be taken by answer; and if no objection be taken either by demurrer or answer the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court, and that the petition does not state facts sufficient to constitute a cause of action.

Section 98. The defendant may demur to one or more of the several causes of action stated in the petition, and answer as to the residue.

When the objections stated in a demurrer are not those of the code it will be considered as a general demurrer that the petition does not state facts sufficient to constitute a cause of action. *McClary v. The S. C. & P. R. R. Co.*, 3 Neb., 52.

When a demurrer only specifies as a ground therefor that the facts stated in the petition are not sufficient to constitute a cause of action, the court, in its decision on the demurrer, should confine itself to that single objection. *Turner v. Althaus*, 6 Neb., 54.

If there is a misjoinder of causes of action, if the defendant do not object, it is not within the province of the court to do so. *Id.*

Legal and equitable causes of action may be joined whenever they fall within section 87 of the code. *Id.*, 55.

A pleading is not demurrable because two or more causes of action or defenses are pleaded but not separately stated and numbered. The remedy is by motion. *The Township of Hartford v. Bennett*, 10 O. S., 441.

A demurrer is not the proper remedy for indefiniteness and uncertainty in the averments of a petition. The remedy is by motion. *Burgess v. Everett*, 9 Id., 429. *The People v. McCallum*, 1 Neb., 203.

Upon demurrer the court will view the whole record and give judgment to the party who thereon appears entitled to it. *Trott v. Sarchett*, 10 Id., 244.

The plaintiff may demur to one or more of the defenses set up in an answer, stating in his demurrer the grounds thereof. If he fail to do so, a compliance with this provision will be required, on a motion being filed for that purpose. *Colby v. Lyman*, 4 Neb., 430.

But where no objection is made to the form of a demurrer to

an *answer* it will be regarded as a sufficient objection that the answer constitutes no valid defense to the plaintiff's cause of action. *Id.*

Misjoinder of defendants. One party cannot demur to a petition on the ground that another party has been improperly joined with him as defendant. *Powers and Weightman v. Bamcratz*, 12 O. S., 273. *Rouse v. Perkins*, 9 Neb.

Belief. When facts constituting a cause of action or defense are stated in a pleading as matter of belief only, and not positively, an objection to this mode of statement cannot be raised by demurrer. *Stoutenburg v. Lybrand*, 13 O. S., 228. *Mills v. Rice*, 3 Neb., 76.

Allegations or denials that a party was at a particular time the owner or holder of a negotiable promissory note, are not mere conclusions of law. As statements of fact they may be indefinite, but this defect is not the subject of demurrer. *Id.* *Trustees v. Odlin*, 8 O. S., 293.

Upon general demurrer to an answer containing several distinct grounds of defense, the demurrer may be overruled if any one of the defenses is sufficient to bar the action. *Shroyer v. Richmond*, 16 O. S., 455.

When a petition shows a good cause of action the mere failure to show that it occurred within the period limited by statute for bringing the action is not a good ground of demurrer. *Huston v. Craghead*, 23 O. S., 199. *Mills v. Rice*, 3 Neb., 76.

Where an answer, setting up the statute of limitations, alleges that the plaintiff's cause of action accrued at a certain date more than six years before the commencement of the suit, a reply which "denies that the cause of action accrued more than six years before the commencement of the suit" will, on demurrer, be held to put in issue the time when the cause of action accrued. The objection to the sufficiency of the reply should be made by motion to make definite and certain. *Whelans, exr., v. Kinsley, exr.*, 26 O. S., 131. But see *Harden v. A. & N. R. R.*, 4 Neb., 521.

A general demurrer to an answer which contains new matter and a specific denial of certain allegations of the petition should be overruled if the allegations denied are material to the plain-

tiff's right to recover. *M. C. & L. M. R. R. Co. v. Hall*, 26 O. S., 310.

A foreign corporation suing in this state is not required to set out in the petition the terms of its charter showing its capacity to maintain the action. *Smith v. Weed Sewing Machine Co.*, Id., 562.

In an action on an executor's bond, as against a demurrer to the petition, it is sufficient allegation of breach to set forth the condition of the bond alleged to have been broken and to aver a non-performance of such condition, although the petition might be open to a motion to make more definite and certain. *Guttridge v. Vanatta*, 27 O. S., 366.

Upon demurrer the petition is sufficient if alleging the appointment by the proper authority of an administrator *de bonis non*, without averring that he had given bond. Id.

Misjoinder of defendants. If a sufficient case is stated against one party it is not ground of demurrer by him that another party is joined against whom no cause of action exists. Id. *Roose v. Perkins*, 9 Neb.

Condition precedent. In an action where the right to recover depends upon the performance of a condition precedent it is sufficient, under section 121 of the code (section 128 of the code of Neb.), to aver performance by general allegation. *Crawford v. Satterfield*, 27 O. S., 421. See *Estabrook v. O. Hotel Co.*, 5 Neb., 76. *Bæhme v. same*, 5 Id., 80.

A general demurrer to an answer for want of facts sufficient to constitute a valid defense will not be sustained when the facts in the answer, if well stated, would constitute a sufficient defense. It is the office of a motion, and not a demurrer, to make a pleading more definite and certain. *Everett v. Waymere*, 30 O. S., 308.

Where an answer is constituted of several numbered paragraphs, a general demurrer to each paragraph is not well taken where the answer as a whole shows a valid defense to the cause of action. Id.

Defect of parties. A demurrer to a petition on the ground that there is a defect of parties defendant will lie only where it appears from the face of the petition that necessary parties defendant are wanting. *Neil v. Trustees*, 31 O. S., 15.

A failure to demur to a reply that does not contain matter suf-

ficient to avoid a defense set up in the answer is not a waiver of the right to object to the sufficiency of the reply, and will not affect the judgment to be rendered. *Brown v. Kroh*, Id., 492.

An objection to the admission of any evidence on the ground that the petition does not state a cause of action may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. Curtis v. Cutler, 7 Neb., 315.

If a party proceeds to trial upon a petition which states no cause of action he cannot, when objection has been made to the introduction of testimony on that ground, after verdict and motion to set the same aside, take judgment on the verdict by then filing an amended petition setting out a cause of action. Id.

Proceedings in error. The provisions of the code, that if no objection be taken on account of defect of parties the defendant will be deemed to have waived the same, applies by analogy to proceedings in error. *Cairnes v. Knight*, 17 O. S., 69.

Demurrer and answer. Where a defendant filed a demurrer and answer at the same time and in the same paper to a petition containing but one cause of action he should be compelled to elect between the two incongruous issues he presents, and the paper ought to be reformed or stricken from the files. *Davis v. Haines*, 6 O. S., 473.

If a demurrer is filed to the whole of the petition containing several distinct causes of action it must be overruled if either one of the causes is sufficient. Cooper v. Clason, 1 Code R., 347.

A demurrer admits the truth of the pleading demurred to as far as is necessary to enable the court to determine on the pleading objected to and no further. Bust v. Critchfield, 5 Ohio, 109.

A demurrer admits the truth of all the facts alleged in the pleading demurred to which are material to the case. *The people v. Weston*, 3 Neb., 320.

A demurrer in fact presents only an issue of law for the court. It is not an absolute admission of the facts stated in the pleading demurred to—it simply denies that those facts as stated constitute a cause of action or defense. If, as some of the cases seem to hold, it was an absolute admission, it could be used as such at any stage of the proceedings.

A demurrer does not lie to a pleading from a failure to attach

a copy of an instrument sued on. *Calvin v. The State*, 12 O. S., 60-66. *Lash v. Christie*, 4 Neb., 262.

Misjoinder of parties. When there is a demurrer for misjoinder of parties it matters not that the petition makes a good case against some of the parties, or against each of them separately. All that the court can do in such case is to sustain the demurrer, leaving it to the plaintiff to amend if he so elect. *Shemokin Bank v. Street*, 16 O. S., 1-8.

If the plaintiff's petition be adjudged insufficient upon demurrer, and no leave to amend be asked for, it is not error to proceed to find judgment against the plaintiff without granting leave to amend. *Devoss v. Gray*, 22 O. S., 160.

Amended pleading. No advantage can be taken of error in sustaining a demurrer to an answer when all the averments in it were contained in an amended answer, on which issue was taken, so that the defendants had the benefit of them on the trial. *Davis v. Gray*, 17 O. S., 330-6. And the same rule applies where an amended reply is filed. *Sage v. Slentz*, 23 O. S., 1.

But where a reply, which sets up new matter sufficient in law to avoid the defense, is on demurrer erroneously held insufficient, and the case is finally disposed of by a finding against the plaintiffs on issues of fact, under which the special matter in the reply is not available to the plaintiff, the error of the court in sustaining the demurrer constitutes a good ground for reversing the final judgment. *Knox Co. Bank v. Lloyd*, 23 O. S., 353.

A party filing a demurrer to a pleading may assign as many of the grounds therefor designated in the code as in his opinion are well taken.

In determining whether a demurrer should be sustained to an amended petition which covers the entire ground of the original, and takes its place, the court will not look beyond the pleading against which the demurrer is directed. *Null v. Jones*, 5 Neb., 500.

The fact that the amended petition predicates the right to recover upon a fact that did not exist when the original petition was filed is no ground for demurrer. *Id.*

A joint demurrer to a petition will be overruled if it states a cause of action against any of those joining in the demurrer. *Dunn v. Gibson*, 9 Neb., 513.

CHAPTER X.

THE ANSWER.

Section 99. The answer shall contain:

First. A general or specific denial of each material allegation of the petition controverted by the defendant.

Second. A statement of any new matter constituting a defense, counter claim, or set-off, in ordinary and concise language, and without repetition.

Section 100. The defendant may set forth in his answer *as many grounds of defense, set-off, and counter-claim as he may have.* Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer.

Section 101. The counter-claim mentioned in the last section must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action.

Section 102. *Defendant cannot recover costs, when.* If the defendant omit to set up the counter-claim or set-off he cannot recover costs against the plaintiff in any subsequent action thereon; but this section shall not apply to causes of action which are stricken out of or withdrawn from the answer as provided in sections one hundred and three and one hundred and twenty-six.

Section 103. When it appears that a new party is necessary to a final decision upon the counter-claim, the court may either permit the new party to be made by a summons to reply to the counter-claim, or may direct the counter-claim to be stricken out of the answer and made the subject of a separate action.

Section 104. A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of a court.

Section 105. *When plaintiff is in danger of losing his claim.* When it appears that a new party is necessary to a final decision upon the set-off the court shall permit the new party to be made if it shall appear that, owing to the insolvency or non-residence of the plaintiff or other cause, the defendant will be in danger of losing his claim unless permitted to use it as a set-off.

Section 106. *Assignment of claim will not defeat set-off.* When cross demands have existed between persons under such circumstances, that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they are equal to each other.

Section 107. *The guardian of an infant or person of unsound mind, or attorney for a person in prison, shall deny in the answer all material allegations prejudicial to such defendant.*

Denial. A defendant must answer the charges in the petition directly and without evasion, and not by way of negative pregnant. *Harden v. A. & N. R. R.*, 4 Neb., 523.

Effect of general denial. Upon a general denial the simple inquiry is—has the plaintiff proved what he has alleged in his petition? And under such an issue nothing can be given in evidence which does not tend to prove or disprove the facts stated in the petition. *School District v. Shoemaker*, 5 Id., 36. *The A. & N. R. R. v. Washburn*, Id., 125. *B. & M. R. R. v. Lancaster Co.*, 7 Id., 33.

Denial of all the material allegations. The defendant filed an answer to the petition of the plaintiff in these words: "The said defendant denies all the material allegations of said plaintiff in his said petition." To this the plaintiff demurred on the ground that the answer did not constitute a defense to the action. The demurrer was sustained when defendant filed an amended answer, upon which judgment was rendered for the plaintiff. On a petition in error being filed in the supreme court, *Held*, 1st, that the answer, liberally construed as required by the code, was good on demurrer; 2d, that when the denial is general it should not be simply "all" but "of each and all," or "each and every," of the allegations referred to. *Lewis v. Coulter*, 10 O. S., 452.

Want of belief. To authorize a denial of an allegation in a petition a want of belief is sufficient, and it is not improper to accompany the denial with a statement that the party making it has no knowledge or information on which to form a belief. *Treadwell v. Commissioners*, 11 O. S., 183.

Not a denial. In order to put plaintiff upon proof of a material averment in his petition the defendant must in some form deny its truth. Hence, when the answer to such averment that "these defendants do not admit," etc., the plaintiff cannot be required to offer proof in regard to it. *Bomberger v. Turner*, 13 O. S., 263.

Not a denial. An averment in an answer, that the plaintiff at the time of the service of the summons on the intestate had no valid judgment against the said Williams, "such as is stated in the petition," is neither such a general or special denial of the material allegations or of any of the material allegations of the petition as would, if true, preclude a recovery, nor is it such a statement of new matter as would, if true, constitute a defense. *Gibbon v. Dougherty*, 10 Id., 370.

Where, however, an answer has been treated as a denial of the facts stated in the petition in the trial court, no objection being made thereto upon that ground, and testimony introduced by the parties to prove or disprove the facts stated in the petition, the answer will be treated as a denial in the supreme court, although it may not amount to a positive denial. The objection must be made on the trial so that the defendant will not be taken by surprise, and the same is true of the reply.

No reply necessary, when. An answer denying that the defendant committed such act, and alleging that it was committed by a third person, is merely a denial and needs no reply. *Hoffman v. Gordon*, Id., 212.

A material allegation of fact in a petition may be specifically denied in the answer; to strike such specific denial from the answer is error. *Everett v. Wayne*, 30 O. S., 308.

Facts stated in an answer which could have been given in evidence under a denial of the averments in the petition do not constitute new matter requiring a reply. *Corry v. Campbell*, 25 O. S., 134.

An answer in a suit on a promissory note which merely states as a defense that the note was "not outstanding against the defendant," and that "there is nothing due on the note," is not a valid defense. *Larrimore v. Wells*, 29 O. S., 13.

Not a denial. An answer to a petition on a promissory note, which merely states that when the action was brought the note was not in existence, cannot be regarded as a denial of the allegations of the petition nor as containing any defense to the action. *Sargent v. Railroad Co.*, 32 O. S., 449.

In an action by a corporation. B. put in an answer consisting of a general denial. *Held*, that such answer did not put in issue the corporate character of the corporation or its power to sue in the courts. *Nat. Life Ins. Co. v. Robinson*, 8 Neb., 452.

New matter. The word "defense" as used in the code includes partial as well as complete defenses. *The A. & N. R. R. v. Washburn*, 5 Neb., 125.

All new matter constituting an entire or partial defense to a cause of action must be concisely and distinctly set up in the answer, and is not admissible under a general denial. *Id.* *Peet v. O'Brien*, 5 Id., 360. *B. & M. R. R. v. Lancaster Co.*, 7 Id., 33.

In a suit on a contract a certain state of facts may at the same time constitute a defense to the cause of the action and be a proper ground of counter-claim; and if pleaded by the defendant in this double aspect upon a single statement of facts, and without formally separating the defense from the counter-claim, the defect, if it be one, is merely formal, and objection thereto can only be made by motion. *Lancaster Manf. Co. v. Colgate*, 12 O. S., 344.

In a suit brought by the holder of a promissory note against his endorser it is not necessary that the petition should allege that the note was transferred for a valuable consideration, as this is presumed, and the want of consideration is a matter of defense to be set up by answer. *Dumont v. Williamson*, 18 Id., 515.

The "offer to compromise" provided for in the code, and the "offer to confess judgment," cannot properly be made in the answer in an action. *Armstrong v. Spears*, 18 O. S., 373.

The allegations in an answer, that said contract "has been a valid and subsisting contract ever since the date of its execution,

and is still a valid and subsisting contract, and binding on the said" widow, is not a sufficient averment of performance, where it is sought to set the contract up, to bar the widow's right of dower. *Phillips v. Phillips*, 14 Id., 308.

In a suit brought on negotiable promissory notes by the indorsee and holder against the maker and indorser (the latter being the payee), the maker answered, averring that the notes were made for the sole accommodation of the payee, and that the plaintiff, having transferred the notes by indorsement to another party, afterwards and before their maturity, with knowledge of the character of the paper, agreed with the payee, for a valuable consideration, and without the knowledge and consent of the maker, that the plaintiff should protect and take up the notes and give the payee time for their payment "beyond the day of their maturity." He also averred that the plaintiff paid and took up said notes shortly after their maturity, though he was not legally charged as indorser by due notice of dishonor or otherwise. *Held*, that the facts so averred do not constitute a defense to the plaintiff's cause of action against the maker; because: 1. The terms of the contract set up as a defense do not import a direct *agreement* to discharge the makers. 2. The stipulation for the extension of time is void for uncertainty. 3. The plaintiff might waive the laches of the holder in failing to give due notice of dishonor, and that the maker was not prejudiced by such waiver. *Ward v. Wicks*, 17 O. S., 159.

An *accommodation* drawer of a bill of exchange made payable at a particular bank, for the purpose of being discounted by the bank named, cannot be held liable on the bill to a third person who, after discount by the bank had been refused, took the bill from the principal for value; nor can he be held liable to the bank where it subsequently discounts the bill for such third person, with notice of the suretyship of the drawer. *Knox County Bank v. Lloyd*, 18 O. S., 353.

Any set-off to a promissory note which would have been good between the original parties may be pleaded against an indorsee who acquires it after maturity. *Davis v. Neligh*, 7 Neb., 78.

No defense. The single fact, that a promissory note payable to bearer was transferred to the plaintiff without consideration, or

solely to enable him to bring suit upon and collect it, constitutes no defense to the action. *Mc Williams v. Bridges*, 7 Neb., 419.

Indorsement in firm name. Admissions. Lincoln, a member of the firm of L. & L., drew a draft at sixty days' sight on T. and S., and indorsed it with the name of the firm. The draft was then discounted by the plaintiff for the benefit of the firm indorsing it, and then forwarded to the drawees and by them accepted. Action against the individual members of the two firms on the draft. T. and S., the acceptors, answered admitting their liability to the plaintiff, but as against the indorsers alleged the acceptance as accommodation merely, and for their benefit, and prayed that it be so certified in the judgment. Lincoln was not summoned, nor did he answer. Lowrey answered, denying his liability on the ground of the unauthorized use of his name by Lincoln in the indorsement, and in reply to the answer of T. and S. denied that they were accommodation acceptors for L. & L., but that the acceptance was for Lincoln alone and for value. At the trial Lowrey stipulated for judgment against himself according to the prayer of the petition. *Held*, that this was a virtual admission of the indorsement and his liability under it, and left but the single question of principal and surety between the defendants to be tried. *Trego v. Lowrey*, 8 Neb., 238.

If an estoppel is relied on as a defense to an action, in order to be availing it must be pleaded. *B. & M. R. R. Co. v. Harris*, 8 Id., 140.

Defect of title. A purchaser of land, who has received a deed containing a covenant of warranty, cannot plead defect of title in bar to an action on the note given for the purchase money unless he has been evicted by title paramount. *Picket v. Picket*, 6 O. S., 525. *Latham v. McCann*, 2 Neb., 278. *Scott v. Twiss*, 4 Id., 138.

Discharge of surety. Where a creditor suspends his right to proceed promptly against a principal debtor to enforce the collection of his debt the surety will be discharged. It should be averred, however, that the suspension was without the assent of the surety. *Bank of Steubenville v. Leavitt*, 5 Ohio, 208. *Dillon v. Russell*, 5 Neb., 484.

Answer of surety. Suit was instituted on a promissory note

executed by M. H. & B. to the plaintiff. B. answered that he was surety on the note for M., who gave a chattel mortgage upon sufficient property to secure the debt, and that the plaintiff failed to record the mortgage, and that M. had squandered the property, whereby the security was lost to the surety. *Held*, that the answer did not state a defense. There is no allegation that the property was not in the possession of M. at the time the note became due. *Burr v Boyer*, 2 Neb., 275.

It is not enough to discharge the surety, that the creditor has agreed to extend the time of payment; such agreement must be upon a sufficient consideration and without the assent of the surety. *Id. Dillon v. Russell*, 5 Id., 484.

An amended answer, purporting on its face not to be supplementary to the original answer, but of itself a "full answer to the plaintiff's petition," and stating facts inconsistent with the original answer, is to be regarded as an abandonment by the defendant of the issues of fact previously made by the original answer and the reply thereto. *Dunlap v. Robinson*, 12 O. S., 530. *Null v. Jones*, 5 Neb., 500.

Quo warranto. The common law system of pleading, and not that prescribed by the code, is to be followed in proceedings in *quo warranto*, and therefore new matter set up in the replication in *quo warranto* in confession and avoidance of the plea is taken as confessed if not denied. *The State v. Taylor*, 25 O. S., 279.

Garnishment. In an action to recover money due on contract, it is sufficient defense to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister state in an action there prosecuted against the plaintiff by his creditors, although it appears that the plaintiff and all such creditors are residents of this state. *B. & O. R. R. Co. v. May*, 25 Id., 347.

Rescission. In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defense to show that, before the plaintiff assented to or acted on the promise made in his favor, the agreement had been rescinded. *Trimble v. Strother*, 25 Id., 378.

A defendant can be required to elect between which of several defenses he will proceed to trial only where the facts stated therein

are so inconsistent that if the truth of one defense be admitted it will necessarily disprove the other. *Pavey v. Pavey*, 30 Id., 600.

Joint Contractors. The code authorizes a judgment against such joint contractors as have been served with summons in the action in those cases *only* where a petition was filed and a summons was issued against *all* such contractors. The petition must be filed and summons issued against *all* although but a portion are or can be served. *Bazell v. Belder*, 31 Id., 572-3.

Set-off is a demand which the defendant makes against the plaintiff in the suit for the purpose of liquidating the whole or part of his claim. 2 Bouvier's Law Dict., 515.

To entitle a party to a right of set-off mutuality is necessary. To constitute mutuality the debts must not only be due to and from the same persons but in the same right or capacity. Therefore a debt due an *estate* cannot be set-off against the personal debt of the executor or administrator. *Holmes v. Robinson*, 4 Ohio, 91. *Boyer v. Clark*, 3 Neb., 167.

A set-off can only be allowed for such claims as in good faith and absolutely belonged to the party at the commencement of the action, and does not extend to claims purchased conditionally for the purpose of using them as a set-off, and with an agreement to return them to the seller if they are not so used. *Straus v. Eagle Ins. Co.*, 5 O. S., 59.

In case of an assignment of a thing in action the action is without prejudice to any set-off or other defense. Code, § 31.

Unliquidated damages, the amount of recovery being uncertain, cannot be the subject of set-off. *Boyer v. Clark*, 3 Neb., 167.

But this excludes only those cases where the jury must determine the amount of *damages* by their own *opinion*, but not those in which they can ascertain the amount by mere calculation. 2 Parsons on Contracts, 743, and cases cited in note q.

Action by and against trustees. Where an action is brought by or against a trustee in that capacity, money due to or from the *cestui que trust* may be set-off, he being the real party in interest. Id.

In an action on a joint debt against a principal and surety, a demand due from the plaintiff to the debtor, under the provisions

of the code, may be set-off against the claim of the plaintiff. *Wagner v. Stocking*, 22 O. S., 297.

A person dealing with an agent, supposing him to be a principal, acquires the same rights as to set-off which he would have if the agent were a principal. But if such person knew that he was dealing with an agent he cannot avail himself of a set-off against the agent when sued by the principal. 2 Parsons on Contracts, 743.

When an action is brought by an executor or administrator upon a claim of the decedent the defendant may set-off any claim he may have against the deceased instead of presenting it to the commissioners or county judge. G. S., page 321.

Counter-claim. The code allows any ground of defense existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action, to be set up as a counter-claim. This provision allows the defendant to plead various matters of defense which could not be entertained before the adoption of the code, either on account of the separation of the law and equity jurisdiction of the courts or the forms of actions or pleadings. But it neither changes contracts nor alters the rights of parties; it only changes and enlarges the mode by which contracts shall be enforced and existing rights vindicated. *Hill v. Butler*, 6 O. S., 217.

Cross bill in chancery. Prior to the adoption of the code the defendant's answer in chancery was in all cases *defensive* merely, and could go no further than to ask the dismissal of the bill. If he desired affirmative relief he must file a cross bill. Lube Eq. Pl., 39. 2 Barb. Ch. Pr., 126.

It was always founded upon the matters in controversy in the original bill, and could not include matters not embraced therein. Mitf. Eq. Pl., 81. Hopk. Ch. R., 48. 1 Van Santvoord's Eq., 214.

It was precisely what the code provides may now be accomplished through the counter-claim of a defendant.

Affirmative relief. In all cases the defendant may set up in his answer the facts entitling him to relief which arise out of the

same transaction or transactions connected with the same subject of action upon which suit is brought. Thus: in an action by a party holding the legal title to recover possession of land, the defendant may set up in his answer the facts showing that he is equitably the owner thereof and entitled to a conveyance of the same from the plaintiff. And he may thereby not only defeat the plaintiff's action but obtain the affirmative relief to which he is entitled. *Crary v. Goodman*, 2 Kern., 366. 1 Van Santvoord's Eq., 213.

Cross petition. A cross petition may be filed when it appears that a new party is necessary to a final decision upon the counter-claim. In such case it is unnecessary to file an answer and a cross petition. It is sufficient to set up in the answer the facts entitling the defendant to relief as against the plaintiff and the party sought to be brought in as defendant. It is not enough to allege the parties sought to be brought in "claim to have some interest in the subject matter of the suit;" the facts must set forth showing them to be necessary parties to the final adjudication of the case. *Com. Bank v. Buckingham*, 12 O. S., 402.

Waste by mortgagee in possession. In an action by a mortgagee for the balance remaining unpaid of the mortgage debt after a sale of the mortgaged premises, the defendant set up as a counter-claim damages sustained by him by reason of waste committed by the mortgagee after the entry of the decree of foreclosure and the sale of the mortgaged premises. *Held*, a proper counter-claim. *Smith v. Fife*, 2 Neb., 13.

In an action to foreclose a mortgage for the purchase money, the defendant who relies on a covenant of warranty cannot, before eviction by title paramount, plead a want of title as a defense. *Latham v. McCann*, Id., 278. *Scott v. Twiss*, 4 Id., 138.

Double aspect. In a suit on a contract a certain state of facts may at the same time constitute a defense to the action and be a proper ground of counter-claim. *The Lancaster Manfg. Co. v. Colgate*, 12 O. S., 344.

A plaintiff, after an answer amounting to a counter-claim has been filed, cannot dismiss his action. *Wiswell v. Congregational Church*, 14 O. S., 31.

The defendant may set up as many defenses as he may have whether

they are legal or equitable. He may deny any or all of the allegations of the petition, and plead matter in avoidance or abatement, or he may set up a counter-claim which will not only defeat the plaintiff's claim but will entitle the defendant to affirmative relief. And the several matters of defense or for relief may be set up in one answer, the only restriction being that the several defenses shall be *consistent*. *Citizens' Bank v. Closson*, 30 O. S., 78.

CHAPTER XI.

THE REPLY.

The plaintiff may demur to one or more of the defenses set up in the answer, stating in his demurrer the ground thereof; and where the answer contains new matter the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language and without repetition, any new matter *not inconsistent with the petition*, constituting a defense to such new matter in the answer.

A reply must be made to all the material allegations of new matter contained in an answer, or they will be taken as true. *Williams v. Evans*, 6 Neb., 216. *Payne v. Briggs*, 8 Id., 75.

Burden of proof. When new matter set up in an answer is denied by the reply the burden of proof is on the party alleging the same as a defense. Id.

New causes of action. A plaintiff can recover only on the causes of action stated in his petition. It is not the province of a reply to introduce new causes of action. This can be done only by amendment of the petition. *Durbin v. Fisk*, 16 O. S., 534.

Facts stated in an answer which could have been given in evidence under a general denial do not constitute new matter requiring a reply. *Corry v. Campbell*, 25 O. S., 134.

A reply which "denies that the cause of action accrued more than six years before the commencement of the suit" will, on demurrer, be held to put in issue the time when the cause of action accrued. *Whelan v. Kinsley*, 26 Id., 131.

The pleader will sometimes be in doubt as to whether an answer contains new matter requiring a reply or not. In such cases the better course is to file a reply.

CHAPTER XII.

INTERVENTION.

Section 47. *When, in an action for the recovery of real or personal property*, any person having an interest in the property applies to be made a party, the court may order it to be done.

In an action to recover land a landlord may intervene when his tenant only has been made defendant. *Godfrey v. Townsend*, 8 How. Pr., 390.

And where a suit is brought to obtain possession of goods taken on execution, the execution creditor may be permitted to intervene. *Conklin v. Bishop*, 3 Duer, 646.

In an action for partition of real estate any one having an interest therein may intervene. *Waring v. Waring*, 3 Abb. Pr., 246.

In an action against the vendor alone to compel the specific performance of a contract to convey land, a third person, claiming to have purchased the land from the vendor prior to the plaintiff, was allowed to intervene. *Carter v. Mills*, 30 Mo., 432.

Promissory note. In Indiana, under the provisions of section 18 of the code (section 41 of the code of Neb.), a third person was permitted to intervene in an action upon a promissory note, and set up in his answer that he was the owner of the note and entitled to the proceeds thereof. *Summers v. Hutson*, 48 Ind., 228. See Pomeroy on Remedies, §§ 423-426.

The application must be made before judgment. *Carswell v. Neville*, 12 How. Pr., 445.

Petition of Landowner to be made Party.

[Title of Cause.]

1. Your petitioner herein shows to the court that an action is now pending in said court by A. B., plaintiff, against C. D., defendant, to recover the possession of the following described real estate, viz.: [*describe premises*], and that said action has not proceeded to judgment.

2. That said C. D. is in possession of said premises as the tenant of your petitioner, and has no other interest therein.

3. Your petitioner has a legal estate¹ in said premises and is entitled to the possession of the same.

4. Your petitioner therefore prays that he may be made a party defendant in said action and be permitted to defend the same.

E. F., *Petitioner.*

[*Verification.*]

By Owner of Chattels to be made Party.

[Title of Cause.]

1. Your petitioner herein shows to the court that an action is now pending in said court by A. B. against C. D. to recover the possession of the following personal property, viz.: [*describe property*], and that said action has not proceeded to judgment.

2. The defendant in said action received said from your petitioner for the purpose of [*transporting the same to.....*]; and your petitioner is the sole owner thereof, and is entitled to the possession of the same.

3. The title of petitioner to said.....is adverse to that of the plaintiff in this action.

[*Add prayer and verification as above.*]

¹ This is a sufficient allegation of title under § 626 of the code.

Order of Court in Action for the Recovery of Real or Personal Property.

[Title of Cause.]

It appearing from the application of E. F., duly verified, that he claims an interest in the property described in the petition in this action, on his motion, therefore, he is made a party defendant in the case.

Order to Bring in Necessary Parties.

[Title of Cause.]

It satisfactorily appearing to the court that E. F. is a necessary party to a complete determination of the question involved herein, he is, on motion of....., made a party defendant, and the plaintiff is required within.....days to amend his petition by adding said.....as co-defendant.

Application for Substitution of Party in case of Transfer of Interest.

[Title of Cause.]

Your petitioner represents to the court that on the.....day of, 18..., the plaintiff therein assigned the cause of action to him by an instrument in writing, of which the following is a copy:

[Copy assignment.]

Your petitioner therefore prays that he may be substituted as plaintiff in this action.

Order of Substitution of Assignee of Claim.

[Title of Cause.]

It appearing to the court, from the verified petition of..... and the evidence, that the interest of A. B. in the subject matter of this suit has been transferred to E. F. during the pendency of the action, he is therefore substituted as plaintiff therein.

Order Substituting Party in Interest for Sheriff.

It appearing to the court that the property in controversy in this action was taken under an execution issued in favor of A. B., and replevied by the plaintiff herein, therefore, upon application of the defendant....., and of the said A. B., it is ordered that the said A. B., upon security for costs being given, be and he is hereby substituted as defendant in the action.

Order on Making new Party to Counterclaim.

[Title of Cause.]

It satisfactorily appearing to the court that G. H. is a necessary party to a final decision upon the counter-claim in this case, on motion of.....it is therefore ordered that said..... be made a party to the action, and that summons be duly issued and served upon him within.....days from this date.

CHAPTER XIII.

VERIFICATION.

Section 112. Every pleading in a court of record must be subscribed by the party or his attorney.

The object of the signature is simply as evidence that the pleading is authentic. It has been held in New York that the signature to the verification was sufficient authentication. *Hubbell v. Livingston*, 1 Code R., 63.

Section 113. *Every pleading of fact must be verified* by the affidavit of the party, his agent or attorney. A pleading verified as herein required shall not be used against a party in any criminal prosecution or action, or proceeding for a penalty or forfeiture as proof of a fact admitted or alleged in such pleading; and such verification shall not make other or greater proof necessary on the side of the adverse party.

Section 114. *Not required, when.* The verification required in the last section shall not be required to the answer of a guardian defending for an infant, or person of unsound mind, or a person imprisoned, nor in any case where the admission of the truth of a fact stated in the pleading might subject the party to a criminal or penal prosecution.

Section 115. *One may verify, when.* If there be several persons united in interest and pleading together the affidavit may be made by any one of such parties.

Section 116. The affidavit shall be sufficient if it state that the affiant believes the facts stated in the pleading to be true.

Section 117. In all cases where the party pleading is a non-resident of the county in which the action is brought, or if he shall be absent from the county where the pleading is filed, an affidavit made before filing the pleading, stating the substance of the facts afterwards inserted in the pleading, shall be a sufficient verification. Such affidavit shall be filed with the pleading intended to be verified thereby.

Section 118. The affidavit verifying pleadings may be made before any person *before whom a deposition might be taken*, and must be signed by the party making the same, and the officer before whom it was taken shall certify that it was sworn to or affirmed before him and signed in his presence.

The certificate of such officer, signed officially by him, shall be evidence that the affidavit was duly made, that the name of the officer was written by himself, and that he was such officer. Id.

Section 119. The verification of a pleading does not apply to the amount claimed except in actions founded on contracts, express or implied, for the payment of money only.

Section 120, *as amended*. (Laws of 1875, page 34.) When the affidavit is made by the agent or attorney it must set forth the *reason* why it is not made by the party himself. It can be made by the agent or attorney only:

First. When the facts are within the personal knowledge of the agent or attorney.

Second. When the plaintiff is an infant, or of unsound mind, or imprisoned.

Third. When the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney.

Fourth. When the party is not a resident of, or is absent from, the county.

Fifth. When the party is a corporation, in which case it may be made by the attorney or any officer or agent upon whom a summons could be legally served.

Forms of Affidavit to Petition or Reply.

THE STATE OF NEBRASKA, }
COUNTY. }

I,, plaintiff [*or one of the plaintiffs*] in the above entitled action, do solemnly swear that I believe the facts stated in the foregoing petition [*or reply*] to be true.

.....

Subscribed in my presence, and sworn to before me, this..... day of....., 18...

E. F., *Clerk of the District Court* [*or Justice of the Peace*].

By an Agent or Attorney.

THE STATE OF NEBRASKA, }
COUNTY. }

I,, do solemnly swear that I am the agent [*or attorney*] of the plaintiff in the above entitled action; that the facts stated in said petition are within my own personal knowledge, and are true as I believe.

Or "that the plaintiff is an infant, or of unsound mind, or imprisoned."

Or "that the petition is founded upon a written instrument for the payment of money only, and such instrument is in my possession."

Or "that the plaintiff is absent from.....county, or is not a resident thereof."

Or "that the plaintiff is a corporation," and I believe the facts stated in the foregoing petition to be true.

.....

Subscribed in my presence, and sworn to before me, this..... day of....., 18...

....., *Clerk of the District Court* [*or Justice of the Peace*].

An agent or attorney having in his possession, as such agent or attorney, a written instrument for the payment of money only, may verify a pleading when such instrument constitutes the substantive cause of action, whether the relief sought is at law or in equity. *Cropsey v. Wiggerhorn*, 3 Neb., 108. This was an action to foreclose a mortgage.

Affidavit to Answer.

THE STATE OF NEBRASKA, }
COUNTY. }

I,, defendant [*or one of the defendants*] in the above entitled action, do solemnly swear that I believe the facts stated in the foregoing answer to be true.

Subscribed, etc.

If made by an agent or attorney state the reasons as in a petition.

The verification is no part of the pleading. The jurisdiction of the court attaches to the defendant when he is legally served with summons, without regard to the defects in the petition or verification. *Johnson v. Jones*, 2 Neb., 136. *Cropsey v. Wiggenghorn*, 3 Id., 116.

The affidavit to the petition is not an element of jurisdiction without which the court cannot act. It is, at most, merely a formal part of the petition—a preliminary form in commencing suit, and its omission amounts to one of those irregularities which cannot be collaterally called in question. *Johnson v. Jones, supra.* *Hull v. Miller*, 4 Neb., 508. *Dorrington v. Meyer*, 8 Id., 211.

If the affidavit is defective it may be amended and the cause proceed. The proper course, where a motion is made to strike the petition from the files, is to ask leave to attach a proper verification to the petition or other pleading.

Motion to Strike Pleading from the Files for Defective Verification.

In the District court of.....County, Nebraska.

A. B. }
 v. }
 C. D. }

The defendant herein moves the court to strike from the files the petition of the plaintiff in this case, for the following reasons, viz.: [*because the affidavit to the same is not signed.*] [*Point out specifically the objection complained of.*]

SAMUEL JONES, *Attorney for defendant.*

Order Overruling Motion.

A. B. }
 v. }
 C. D. }

The motion of the defendant to strike the petition of the plaintiff from the files came on for hearing, and it appearing that said plaintiff has, by leave of court, verified said petition, the motion is overruled.

The application to amend should be made before the petition is stricken from the files. The better practice is to make the order conditional, that in case of failure to amend in time and on the terms prescribed, the action be dismissed. *Wilson v. Macklin*, 7 Neb., 50.

Where an amended *petition* is filed, an alias summons is not necessary. Jurisdiction over the person of the defendant once acquired will continue, and can only be lost by an actual dismissal of the action. *Healy v. Aultman*, 6 Id., 349.

It is unnecessary in a pleading to state the *reasons* why a party alleges or denies a fact. All that the law requires is good faith on the part of the pleader. And if he believes the facts stated in his pleading to be true the reason *why* he so believes usually had better be omitted as tending to encumber the pleading.

CHAPTER XIV.

MOTIONS AND AMENDMENTS.

Section 125. *If redundant, scandalous, or irrelevant matter be inserted in a pleading*, it may be stricken out on motion of the party prejudiced thereby. And when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge of defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

The only mode of objecting to irrelevant or redundant matter in a pleading is by a motion to strike it out. An allegation is

said to be irrelevant when the issue formed by its denial can have no connection with or effect upon the cause of action. Pomeroy on Remedies, § 551.

Where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his cause of action, the defendant may move to have the petition made definite and certain, but cannot strike out such matter as redundant and irrelevant. *Dorsey v. Hall*, 7 Neb., 460.

Motions, when to be made. A motion to strike out, to make definite and certain, or to separately state and number the causes of action must be made—if to the petition, before the answer or demurrer is filed; if to the answer, before a demurrer or reply is filed. The motion must point out *specifically* the matter to which objection is made, and must not include matter which is not objectionable. In case it does the court must overrule it, even if matter is included in the pleading which should be stricken out.

Forms of Motions.

In the District Court of.....County, Nebraska.

A. B. }
 v. }
 C. D. }

The defendant moves the court to strike out of the petition of the plaintiff [or *first, second, or other counts thereof, as the case may be*] the following words, viz.: [*specifically point out the words objected to*] because the same are redundant [*and irrelevant*].

C. D., by SAMUEL JONES, *his Attorney.*

Motion for more Specific Statement.

[Title of Cause.]

The defendant moves the court to require the plaintiff to state more specifically the cause of action set forth in his petition [*by setting forth the several items of his claim together with the dates thereof*].

If the motion is intended to apply to more than one count or statement of facts it may be in this form:

[Title of Cause.]

The defendant moves the court to require the plaintiff to set forth in his petition [*or the first count thereof*]:

1st. The several items of his claim, together with the dates thereof.

2d. To attach a copy of the note sued on to his petition.

3d. To state the amount paid thereon and dates of payment.

Motion to Separately State and Number his Causes of Action.

[Title of Cause.]

The defendant moves the court to require the plaintiff to make his petition definite and certain by separately stating and numbering his causes of action.

Order to Strike out Irrelevant [or Redundant], Matter.

[Title of Cause.]

This cause came on for hearing, upon the motion of the defendant, heretofore filed, to strike out of the petition certain irrelevant [*or redundant*] matter, on consideration whereof the court doth sustain said motion [*or the first, second, or other paragraph thereof as the case may be*] and orders that all the words in said petition from and including the word ".....," in the.....line ofpage, to and including the word ".....," in the.....line of the.....page, be stricken out of the same, and as to all other matter objected to therein the motion is overruled.

To make Definite and Certain.

[Title of Cause.]

This cause came on for hearing, on the motion of the defendant, heretofore filed, to require the plaintiff to state more specifically his cause of action by setting forth in his petition the several items of his claim together with the dates thereof, on consideration whereof the court doth sustain said motion, and leave is given the plaintiff to amend his petition within.....days from this date.

If the plaintiff fail to amend his petition as required by the order of the court it may be stricken from the files and the cause dismissed. A reasonable time should be given in which to make the amendment.

CONSOLIDATION OF ACTIONS.

Sections 150-151. Whenever two or more actions are pending in the same court which might have been joined the defendant may, on motion and notice to the adverse party, require him

to show cause why the same should not be consolidated. The order for consolidation may be made by the court, or a judge thereof in vacation.

The test for allowing the motion is, are the actions such as might have been joined? If they are, ordinarily, the motion to consolidate should be sustained. The consolidation is for the benefit of the defendant, therefore, if he object, the order cannot be made.

The object is to save costs and prevent a multiplicity of suits. The motion is regarded with favor and should not be denied, unless for cause the parties will be prevented from having a full and fair trial, where it is clear that the parties are the same and the causes of action such as can be joined. Howlett v. Martin, 3 Law Gazette, 266.

A plaintiff brought a separate action against the same defendants in each of the counties of the state, for the same libel, which was first published in the county in which all the parties resided. The defendants' motion to consolidate the actions was sustained. *Percy v. Seward, 6 Abb., 326.*

The motion is addressed to the sound discretion of the court, and the order thereon is not subject to review unless there is a very clear abuse of discretion.

Notice of Motion to Consolidate Actions.

[Title of Cause.]

The plaintiff is hereby notified that I have filed a motion in said court to consolidate the actions pending therein, entitled A. B. v. C. D., No. 21, and A. B. v. C. D., No. 22. You are required to show cause by the.....day of....., 18..., why said actions shall not be consolidated.

Dated....., 18...

C. D.,

By SAMUEL JONES, *his Attorney.*

Motion to Consolidate Actions.

[Title of Cause.]

The defendant moves the court to consolidate into one actions Nos. 21 and 22, pending in this court, in each of which A. B. is plaintiff and C. D., defendant.

C. D.,

By SAMUEL JONES, *his Attorney.*

Order of Consolidation.

[Title of Cause.]

On motion of the defendant, after due notice to the plaintiff, who failed to show cause why said motion should not be sustained, it is hereby ordered that this action No. 21, and case No. 22, in this court, be and the same are hereby consolidated into one action. And it is further ordered that all proceedings in said consolidated action be heard in the aforesaid case No. 21, and that the said plaintiff pay all costs now incurred in all of said actions but this.

MISTAKES AND AMENDMENTS.

Section 138. No variance between the allegations in the pleadings and the proof is to be deemed material unless it have actually misled the adverse party to his prejudice in maintaining his action or defense on the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as may be just.

Section 139. Whenever the variance is not material, as provided in the last section, the court may direct the fact to be found according to the *evidence*, and may order an immediate amendment without costs.

Section 140. *Failure of proof.* When, however, the allegation of the claim or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its general scope and meaning, it is not to be deemed a case of variance, within the last two sections, but a failure of proof.

Section 141. The plaintiff may amend his petition without leave, at any time before the answer is filed, without prejudice to the proceeding; but notice of such amendment shall be served upon the defendant or his attorney, and the defendant shall have the same time to answer or demur thereto as to the original petition.

Section 142. At any time within ten days after a demurrer is filed the adverse party may amend, of course upon payment of costs since filing the defective pleading. Notice of filing an amended pleading shall be forthwith served upon the other

party, who shall have the same time thereafter to answer or reply thereto as to an original pleading.

Section 143. *Upon a demurrer being overruled* the party who demurred may answer or reply, if the court be satisfied that he has a meritorious claim or defense, and did not demur for delay.

Section 144, *as amended* (Laws of 1875, p 35). The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any proceeding taken by a party fails to conform in any respect to the provisions of the code the court may permit the same to be made conformable thereto by amendment.

Section 145. The court, in every stage of an action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect.

Section 146. If the demurrer be sustained the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion may direct.

Section 147. When either party shall amend any pleading or proceeding, and the court shall be satisfied by affidavit or otherwise that the adverse party could not be ready for trial in consequence thereof, a continuance may be granted to some day in term, or to another term of the court.

Section 148. *When the plaintiff shall be ignorant of the name of the defendant*, such defendant may be designated in any pleading or proceeding by any name or description, and when his true name is discovered, the pleading or proceeding may be amended accordingly. The plaintiff in such case must state in the verification of his petition that he could not discover the *true name*, and the summons must contain the words "real name unknown,"

and a copy thereof must be served personally upon the defendant.

One of the primary objects of the code is to prevent the rights of a suitor from being sacrificed to technical rules, or omissions, or mistakes. The word "proceeding" is applicable to every step taken by a suitor to obtain the interposition or action of a court, and is used to distinguish all other steps taken in an action from those embraced in the word "pleading." *Johnson v. Jones*, 2 Neb., 136-7.

Material defects may be remedied. Under our statute of amendments great latitude is given to the court in permitting even material defects to be remedied, especially when they were occasioned by mistake or are the result of oversight, and it can be seen that by so doing substantial justice will be done, and this rule is not limited to pleadings merely, but is applicable to all proceedings in civil actions. *Irwin v. Bank of Bellfontaine*, 6 O. S., 81. *O'Dea v. Washington Co.*, 3 Neb., 118. *Struthers v. McDonald*, 5 Id., 491. *Mills v. Miller*, 3 Id., 95.

Against partners. When on the trial of an action, commenced against the members of a partnership as such, it is discovered that the transaction was really with a single member of the firm in his individual capacity, the court may permit an amended petition to be filed changing the title and form of the action accordingly. *Reed v. Beardsley*, 6 Neb., 493.

If a suitor has been deprived of a substantial right by the refusal of the court to permit an amendment, the supreme court, in a proper case, will grant him relief. *Wilson v. Macklin*, 7 Neb., 50.

The application to amend should be made before the cause is dismissed. The better practice is to make the order conditional, that in case of failure to amend in the time and on the terms prescribed the action be dismissed. *Id.*

Where testimony is introduced without objection tending to prove a different issue from that made in the pleadings, the court may, after the trial, permit the pleadings to be amended to conform to the facts proved. *Catron v. Shepherd*, 8 Neb., 308.

But if a party proceeds to trial on a petition which states no cause of action he cannot, where proper objections have been made to the

introduction of testimony on that ground, after verdict and a motion to set the same aside, take judgment on such verdict by then filing a petition setting out a cause of action. *Curtis v. Cutler*, 7 Neb., 315.

The general power of amendment given to the courts by the code is very broad, and is only limited by the "justice" of the case. But the statutory *thing* to be amended must exist before the power can be exercised. *Shamokin Bank v. Street*, 16 O. S., 10.

Upon leave to file an amended petition in an action on an official bond, in addition to amending the original cause of action, a new and distinct cause of action, then barred by the statute of limitations, was stated along with the amended cause of action on the bond. *Held*, that it was not error to strike from the petition all matter not material to the cause of action on the bond. *Commissioners v. Andrews*, 18 O. S., 50.

Record in court below corrected. While a petition in error was pending in the supreme court application was made to the court of common pleas, on notice to the adverse party, for an amendment of the record in a case in which judgment had been rendered at a former term of the court, by changing the names of the drawees of the bill of exchange, as expressed in the petition, so as to make the same conform in the petition to the copy thereto attached and to the bill on which judgment was rendered. Upon a copy of the amended record being filed in court, and a remittitur filed for an excess, the judgment was affirmed. *Doty v. Rigour*, 9 O. S., 526. *Wise v. Frey*, 9 Neb., 217.

Cannot increase damages. When a verdict is rendered for a larger sum than is claimed in the petition the court cannot permit the petition to be amended by increasing the damages claimed unless the plaintiff relinquish the verdict, pay defendant's costs, and consent to a new trial. *Corning v. Corning*, 6 N. Y., 97.

But the plaintiff may remit the excess and the verdict may be permitted to stand. *Id.*

The code authorizes an amendment when the mistake goes to the substance of the pleadings or proceedings. Broader and more efficient language could hardly have been used to vest this power. The only limit seems to be to cases where an amendment would not

be in furtherance of justice. *Irwin v. Bank of Bellfontaine*, 6 O. S., 90.

While on the one hand courts will not visit on a suitor the mistakes of his attorney by throwing his case out of court, they will at the same time carefully protect the party who objects to a defect in pleadings or proceedings from suffering any unreasonable delay or injustice by the correction of mistakes. Cases undoubtedly will occur where it will not be in furtherance of justice, but a manifest and clear encouragement of a litigious spirit, to permit an amendment, and probably in such cases the court will not interpose. When, too, the defect in the proceeding is so gross, or is committed under such circumstances as to indicate that the defect itself was designed, and not simply a mistake, the court would probably refuse permission to amend. *Id.*

Upon petition in error the district court may order the court of common pleas to send up a perfect transcript of its record, but it has no power in such case to order an amendment of the record itself. *Wood v. Newkirk*, 15 O. S., 295.

The restriction upon amendments in section 137 of the code (144 of the code of Nebraska), that the proposed amendment "must not change substantially the claim or defense," does not refer to the *form* of the remedy, but to the general identity of the *transaction* forming the cause of complaint. *Spiee and Son v. Steinruck*, 14 O. S., 213.

Every court, in the exercise of its supervisory and protecting charge over its records and the papers belonging to its files, has the power to direct the clerk to correct, not only clerical errors, but such errors as may arise from any fraudulent or improper alteration of its files or records. *Hollister v. The Judges*, 8 O. S., 202.

Motions for leave to amend pleadings in the district court, in cases brought there by appeal, are addressed to the sound discretion of the court, and its rulings thereon will not be reversed on error, except where all the facts bearing upon the motion are set forth, and where there has been a manifest abuse of discretion. *Brock v. Bateman*, 25 Id., 609.

Amended pleadings. Defendant having filed an answer to a petition, and plaintiff thereupon filed an amended petition, to

which defendant answers, without making the original answer part of the second answer, the case stands for trial on the amended pleadings, and the original pleadings are disregarded. *Bank v. Telegraph Co.*, 30 Id., 555.

Not a bona fide indorsee. A person other than the payee who brings an action against the maker on a note payable to the order of the payee, and frames his petition under section 122 of the code (129 of the code of Nebraska), without giving a copy of an indorsement by the payee, is not entitled under such petition to the protection given to a *bona fide* indorsee for value and before maturity, although the note, when offered in evidence, appears with the name of the payee indorsed thereon. *Tisen v. Hanford*, 31 Id., 193.

The law as to the amendment of pleadings may be stated thus: That an amendment will be allowed in a proper case where the proposed amendment does not change substantially the claim or defense, although the *form* of the action may be changed. The supreme court of Wisconsin has given this provision a narrow construction, which has not been followed to any extent by the courts of the other states. "So long as the court can see that the identity of the cause of action is preserved, the particular allegations of the declaration may be changed and others superadded, in order to cure imperfections and mistakes in the manner of stating the plaintiff's case." *Stevenson v. Mudgett*, 10 N. H., 338.

A party in default may be permitted to answer upon such terms as to payment of costs as may be prescribed by the court at any time before judgment is rendered, and when it is apparent that he has a meritorious defense the court must permit the answer to be filed. *Blair v. West Point Manufacturing Co.*, 7 Neb., 146.

A summons may be amended, but without an appearance a copy of the amended summons must be served on the defendant. *Watson v. McCartney*, 1 Neb., 133. *Martin v. Coppock*, 4 Id., 177.

Mistake in name of defendant. A policy of insurance contained a provision that no suit should be brought thereon unless commenced within twelve months next after the loss. A loss having

occurred, the assured, within the time limited, filed his petition against the company in due form of law, and caused a summons to be issued and served in due time upon the company. But by mistake the name of another company, instead of that of defendant, was inserted in the *body* of the summons, although the indorsement and entitling of the summons were correct and in conformity with the petition. After service of this defective summons upon the defendant, and after the expiration of the twelve months limited for bringing the action, the company voluntarily appeared in court and moved to strike the plaintiff's petition from the files, but made no motion to quash the writ or return. The plaintiff then, on leave of the court, amended the writ so as to make it conform to the petition. *Held*, that the amendment was authorized by the code, and had the effect to make the action one brought within twelve months after the happening of the loss. *Barton v. Buckeye Ins. Co.*, 26 O. S., 467. *Martin v. Coppock*, 4 Neb., 177.

Attachment. An affidavit for the issuance of an attachment may be amended by leave of court even after a motion to quash the proceedings is filed because of that particular defect. *Struthers v. McDowell*, 5 Neb., 491.

An objection that affiant's name was omitted from the body of the affidavit, he having duly signed it at the close, is technical merely, and no ground for dissolving the attachment. *Rudolf v. McDonald*, 6 Neb., 163.

The want of venue, however, if taken advantage of by the defendant at the proper time, is a fatal defect, unless cured by amendment. And where the venue is omitted by mistake it is proper for the court to allow an amendment in accordance with the facts. *Id.*

Undertaking for an appeal. In *O'Dea v. Washington Co.*, 3 Neb., 122-3, it was held that where an appeal bond is defective it may be amended in the appellate court by consent of sureties, or the court may permit a new bond to be filed. *Irwin v. Bank of Bellfontaine*, 6 O. S., 81. *Negley v. Jeffers*, 28 Id., 90.

In the absence of a statute authorizing it the deposit of money, in lieu of an undertaking, is not a substitute for an undertaking, and is not sufficient to authorize an appeal; and it cannot be

amended into an undertaking. *Shamokin Bank v. Street*, 16 O. S., 1-9.

The court in every stage of the proceedings must disregard every error and defect which does not affect the substantial rights of the parties. A petition entitled "Supreme Court of New York," and filed in a district court of this state, is no ground for dissolving an attachment issued in the cause. *Livingston v. Coe*, 4 Neb., 379.

An answer was entitled "in the supreme court" instead of "superior court." *Held*, that the mistake should be disregarded. *William v. Sholto*, 4 Sand., 641.

An affidavit for an order of arrest was entitled "in the cause," prior to the commencement of the action. *Held*, that the defect did not affect the substantial rights of the parties. *Pinden v. Black*, 3 Pr., 95.

On a motion being filed to strike the petition from the files because the word "petition" did not follow the names of the parties, *Held*, that the omission did not affect the substantial rights of the parties. *Butcher v. Bank of Brownville*, 2 Kan., 70.

Where a defendant has been regularly served with summons, and there is a defect in the return of the officer respecting the service, the defect may at any time, even after judgment, be cured by amendment to make the return conform to the facts. *Kirkwood v. Reedy*, 10 Kan., 453.

Notice of Filing Amended Petition.

In the District Court of.....County, Nebraska.

A. B. }
 ^{v.}
 C. D. }

The defendant will take notice that on the.....day of....., 18..., I filed an amended petition in said cause.

A. B.,

Dated....., 18...

By SAMUEL JONES, *his Attorney.*

Order on Overruling Demurrer with Leave to Answer.

[Title of Cause.]

This cause came on for hearing on the demurrer to the petition heretofore filed by the defendant, on consideration whereof,

and the court, being fully advised in the premises, doth* overrule the same, and on defendant's motion he is allowed to answer within.....days.

Order where Demurrer is Sustained with Leave to File Amended Petition, Answer, or Reply.

Follow the above to the *, then add—sustain the same, and on plaintiff's motion he has leave to file an amended petition in..... days from this date.

Order in Case of Immaterial Variance.

[Title of Cause.]

This cause came on for trial upon the issue joined between the parties, and there being a variance between the pleading of said plaintiff and the proof, but which has not misled the defendant to his prejudice in maintaining his defense upon the merits, the court therefore finds that said variance is not material. It is therefore considered by the court that the plaintiff have leave to amend his petition instantler to conform to the facts proved, and that the trial proceed.

Order in Case of Material Variance.

[Title of Cause.]

This case came on for trial upon the issue joined between the parties, and there being a variance between the pleading of said plaintiff and the proof, by which the defendant has been misled to his prejudice in making his defense, the court therefore finds said variance to be material. It is therefore considered that said cause be continued at the cost of this term of the plaintiff, and that he have leave to amend his petition within.....days from this date.

CHAPTER XV.

SUPPLEMENTAL PLEADINGS.

Section 149. Either party may be allowed, on notice, and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer, or reply, alleging facts material to the case, occurring *after* the former petition, answer, or reply.

Section 177 of the New York code, as amended in 1849 and 1866, is as follows: "The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint, answer, or reply, alleging facts material to the case occurring after the former complaint, answer, or reply, *or of which the party was ignorant when his former pleading was made.*"

It will be perceived that under the New York code facts of which a party was *ignorant* at the time of filing his former pleading may be set up in a supplemental plea.

Under our code a supplemental pleading can be filed only in cases where facts have occurred *after* filing the former petition, answer, or reply, which are necessary to be considered in the determination of the case. It is necessary to bear this distinction in mind in considering the New York cases.

A supplemental petition is not a substitute for the original petition. It is merely an additional petition, leaving the original in full force and effect, but is designed simply to set up facts which have occurred since filing the former petition.

Matters which arose prior to the commencement of the action, although discovered afterward, must be set up by an amended and not by a supplemental petition. In case of the death, marriage, or disability of a party, and the action is to be continued by or against his personal representatives, it must be done by supplemental petition, and not by amendment. *Green v. Bates*, 7 How. Pr., 296. So, where in action to foreclose a mortgage, there being nothing due but a certain amount of interest, it was *held*

that unless other installments of interest, or the principal, if it had become due, had been brought into the case by a supplemental petition, the recovery must be limited to the sum due at the commencement of the action. *Null v. Jones*, 5 Neb., 502-3. But in the case last cited a petition was filed while merely a portion of the interest was due, and summons was served upon the defendant, and no further proceedings were had until the entire sum had become due, when an *amended* petition was filed praying a foreclosure and sale for the entire sum due on the notes and mortgage. *Held*, on demurrer to the petition, that it stated a cause of action. See also *Beck v. Stephano*, 9 How. Pr., 193.

A supplemental petition should refer to the original *petition* and the proceedings had thereon, but it is unnecessary to copy the allegations of the original petition. Story's Eq. Pl., 343.

Where it is merely sought to substitute parties in case of a transfer of interest it may be done by motion, supported, when necessary, by affidavits or other evidence.

In many, if not all cases, the right to file a supplemental pleading should not be denied when it is apparent that the matter set up is material to the party seeking to file the same.

The party desiring to file a supplemental pleading must file a motion for that purpose, and serve a notice of the object of the motion on the adverse party.

Notice.

In the District Court of.....County, Nebraska:

A. B. }
 v. }
 C. D. }

The defendant will take notice that on the.....day of..... 18..., or as soon thereafter as the motion can be heard, I will apply to said court for leave to file a supplemental petition in said cause, setting up that there has accrued to me since the commencement of the action on the note and mortgage upon which the action is brought the sum of \$ interest, and the further sum of \$..... as principal. Dated....., 18....

A. B.,

By WILLIAM WENTWORTH, *his Attorney.*

Motion.

[Title of Cause].

The plaintiff moves the court for leave to file a supplemental petition setting up certain sums which have become due from the defendant to the plaintiff, upon the note and mortgage sued on since the action was brought.

A. B.,

By WILLIAM WENTWORTH, *his Attorney.**Affidavit.*

In the District Court of.....County, Nebraska:

A. B. }
 v }
 C. D. }

I, A. B., do solemnly swear that since the commencement of this action there has become due to me as interest on the note and mortgage upon which the action is brought the sum of \$....., and also the further sum of \$..... as principal. I therefore ask to set up said facts in a supplemental petition.

A. B.

Subscribed in my presence and sworn to before me this..... day of....., 18....

.....*Clerk of the District Court.**Supplemental Petition.*

[Title of Cause.]

The plaintiff alleges that since the filing of the former petition in this action, to which this is supplemental, there has accrued to him upon the note and mortgage upon which the action is brought, in addition to the sum claimed in said petition, the further sum of \$....., due as interest thereon, and also the sum of \$..... as principal. That said interest became due on the.....day of....., 18..., and said principal on the..... day of....., 18.... Wherefore plaintiff prays that an account may be taken of the amount due the plaintiff upon said note and mortgage, and for a decree of foreclosure as prayed in the original petition.

A. B.

Verification.

Defects in the petition or answer may be corrected by motion or demurrer, as in case of original pleadings. Where a supple-

the firm name. In all other cases the several persons composing the firm must sue or be sued by their individual names and not in the name of the firm. In suing a partnership it is generally preferable to bring the action against the individual partners.

No. 1.

Promissory Notes: Payee v. Maker.

[Title of Cause.]

1. The plaintiff complains of the defendant for that on theday of....., 18..., said defendant made and delivered to the plaintiff a promissory note of which the following is a copy:

“\$500.

“OMAHA, NEBRASKA, August 1, 1878.

“One year after date, for value received, I promise to pay A. B., or order, the sum of five hundred dollars, with interest from date at the rate of seven per cent.

“C. D.”

2. ²No part thereof has been paid, and there is now due thereon from the defendant to the plaintiff the sum of \$500, with interest at seven per cent, from the first day of August, 1878, for which, with costs of suit, he prays judgment. Or the following formal prayer: The plaintiff therefore prays judgment against the defendant for the sum of \$500, with interest thereon from the first day of August, 1878, and costs of suit.

S. J., *Attorney for Plaintiff.*

Verification.

Section 129 of the code provides that “In an action, counterclaim, or set-off, founded upon an account, promissory note, bill of exchange, or instrument for the *unconditional payment of money only*, it shall be sufficient for the party to give a copy of the account or instrument, with all the credits and endorsements thereon, and state that there is due him on such account from the adverse party a specific sum, which he claims with interest.

¹No formal words are necessary in commencing a petition. The author has adopted the substance of the common law form. See 2 Chitty Pl. (13 Am. Ed.), 12.

²In case of part payment say: On the....day of...., 18..., the defendant paid the plaintiff on said note the sum of \$.... and no part thereof has been paid except said sum of \$....

No. 2.

Against two Defendants upon Joint Note, and as Maker and Endorser.

[Title of Cause.]

1. *First cause of action.* The plaintiff complains of the defendants for that on the.....day of....., 18..., said defendants made and delivered to the plaintiff a promissory note, of which the following is a copy:

“\$1000. “LINCOLN, NEBRASKA, September 1, 1879.

“Sixty days after date, for value received, we promise to pay A. B., or order, the sum of one thousand dollars, with interest from date. “C. D.

“C. D.

"E. F."

2. No part of said note has been paid, and there is now due the plaintiff from the defendants thereon the sum of \$1000, with interest from the first day of September, 1879.

3. *Second cause of action.* On the first day of October, 1879, the defendant, C. D., made and delivered to E. F. a promissory note, of which the following is a copy:

"\$600. "GRAND ISLAND, October 1, 1879.

“Ninety days after date, for value received, I promise to pay E. F., or order, the sum of six hundred dollars.

"C. D."

4. On the first day of November, 1879, the said E. F. endorsed said note as follows: "Pay A. B., or order," E. F.," and delivered the same to the plaintiff.

5. On the day said note became due it was then presented to C. D., and payment thereof demanded, which was refused, and it was thereupon protested for non-payment, of all of which said E. F. had due notice.

6. Said E. F. is liable on said note as indorser, and C. D. as maker.

7. No part of said note has been paid, and there is now due

¹ Section 129 of the code provides that, "Where others than the makers of a promissory note, or the acceptors of a bill of exchange, are parties in the action, it shall be necessary to state also the kind of liability of the several parties, and the facts as they may be which fix their liability."

the plaintiff thereon from the defendants the sum of \$600, with interest from the.....day of....., 18...

8. The plaintiff therefore prays judgment for the sum of \$1,600, with interest upon \$1000 from the first day of September, 1879, and with interest upon \$600 from the third day of January, 1880, and costs of suit.

A. B.,

By S. J., *his Attorney.*

No. 3.

On a Joint and Several Promissory Note.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendants made their certain promissory note in writing of that date, and delivered the same to the plaintiff, and thereby severally promised to pay to the plaintiff, or order [*six months after the date thereof*], the sum of \$....., with interest thereon from date at the rate of ... per cent.

2. Said note is now due and payable, yet the said defendants, nor either of them, have paid the same nor any part thereof. A copy of said note is hereto attached.

3. The plaintiff therefore prays judgment against the defendant for the sum of \$....., and interest thereon from the day of, 18..., and costs of suit.

No. 4.

Note of Firm.

A. B., plaintiff,

v.

C. and D., a company formed for the
purpose of carrying on business in
Nebraska, and not incorporated,
defendant.

1. The plaintiff complains of the defendant, a company formed for the purpose of doing business in Nebraska, and not incorporated, for that on the day of, 18..., at, said defendants, by their firm name, made their certain promissory note in writing of that date, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff, or order, [*ninety days from the date thereof*], the sum of \$....., with interest thereon from date.

2. Said note is now due and payable, yet the said defendants have not paid the same nor any part thereof. A copy of said note is hereto attached.

3. The plaintiff therefore prays judgment against the defendant for the sum of \$....., with interest thereon from the day of, 18....

A suit by or against a company not incorporated, by its firm name, without disclosing the names of the several partners, could not be maintained at common law. It lacked the certainty deemed essential to judicial proceedings. 1 Chitty Pl., 256. *Haskins v. Alcott*, 13 O. S., 216. *B. & M. R. R. Co. v. Dick*, 7 Neb., 242.

The averment, where an action is brought in the firm name, that the plaintiffs are a firm doing business by that name, without adding "within this state," or other equivalent words, will not entitle them to maintain an action in the firm name. *Haskins v. Alcott*, 13 O. S., 216.

A company suing by its *firm name* must by averments bring itself within the provisions of the statute, and the failure to do so is ground of demurrer for want of legal capacity to sue. *Id.*, 210.

NO. 5.

On Note made by Partners to Partners.

A. B. and C. D., partners, doing
business under the name and
style of A. B. & Co., plaintiffs,

v.

E. F. and G. H., partners, doing
business under the name and
style of E. F. & Co., defendants.

1. A. B. and C. D., partners, doing business under the name and style of A. B. & Co., plaintiffs, complain of E. F. and G. H., partners, doing business under the name and style of G. H. & Co., defendants, for that on the day of, 18..., said defendants, by the firm name, made, etc. [*as in the preceding form*].

NO. 6.

The Same.

[Title of Cause.]

1. The plaintiff complains of the defendants for that at the time of making the note hereinafter copied the defendants were

partners doing business at....., in the state of, under the firm name of E. and F.

2. On the.....day of....., 18..., said defendants, in their firm name of E. and F., made and delivered to the plaintiff a promissory note in writing, in the words and figures following, to-wit: [*or of which the following is a copy:*]

[*Copy note.*]

3. No part thereof has been paid, and there is now due thereon from the defendants to the plaintiff the sum of \$....., with interest from the.....day of....., 18....

No. 7.

On Note Payable to Order of their Firm Name.

1. The plaintiffs complain of the defendants for that said defendant, on the.....day of....., 18..., made and delivered to the plaintiffs, under the firm name of E. and F., a promissory note in writing in the words and figures following, to-wit:

[*Copy note.*]

2. No part thereof has been paid, and there is now due from the defendant to the plaintiffs thereon the sum of \$....., with interest from the.....day of....., 18....

No. 8.

By Surviving Partner on Note Payable to Firm.

1. On theday of....., 18..., said defendants, in their firm name of E. and F., made and delivered to the plaintiff, and one,, then partners doing business under the name of, a promissory note in writing in the words and figures following, to-wit:

[*Copy note.*]

2. The plaintiff alleges that on the.....day of....., 18..., F. died, and the plaintiff is now the sole surviving partner of said firm.

3. No part of said note has been paid, and there is now due thereon from the defendants to the plaintiff the sum of \$....., with interest from the.....day of....., 18....

No. 9.

By Payee v. Surviving Partner.

1. The plaintiff complains of the defendant for that at the time of making the note, hereinafter copied, the defendant was a partner with one F., and doing business at....., in the state of....., under the firm name of E. and F.

2. On the.....day of....., 18..., said E. and F., in their firm name, made and delivered to the plaintiff a promissory note in writing, in the words and figures following, to-wit:

[*Copy note.*]

3. The plaintiff alleges that on....., the.....day of....., 18..., said F. died, and that said E., defendant, is the sole surviving partner of said firm.

4. No part of said note has been paid, and there is now due the plaintiff from the defendant thereon the sum of \$....., with interest from the.....day of, 18....

No. 10.

On Note Signed by Agent.

1. The plaintiff complains of the defendant for that on theday of....., 18..., said defendant, by A. B., his then agent in that behalf, made and delivered to the plaintiff a promissory note in writing in the words and figures following, to-wit:

[*Copy note.*]

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18...

No. 11.

On Note of Corporation.

1. The plaintiff complains of the defendant for that said defendant, at the date hereinafter mentioned, was and still is a corporation duly organized under the general laws of the state of.....

2. On the.....day of....., 18..., the defendant, as such corporation, by its agent, A. B., duly authorized thereto, made and delivered to the plaintiff a promissory note in writing, in the words and figures following, to-wit:

[*Copy note.*] [*Continue as in preceding form.*]

No. 12.

Insurance Company on Premium Note.

1. The plaintiff complains of the defendant for that at the date hereinafter mentioned the plaintiff was and still is duly organized as a mutual insurance company under the general laws of the state of....., and duly authorized to transact business therein.

2. On the.....day of....., 18..., the defendant made and delivered to the plaintiff a promissory note in writing in the words and figures following, to-wit:

[*Copy note.*]

2. On the.....day of....., 18'..., the plaintiff, by its board of directors, in conformity to the charter and by-laws of said corporation, required the defendant to pay the sum of \$.....upon said note within.....days from that date, of which he was duly notified.

[*Continue as in form No. 10.*]

No. 13.

On a Note Wrongly Dated.

1. The plaintiff complains of the defendant for that on theday of....., 18..., the defendant made his promissory note in writing, bearing date by mistake the day of....., 18..., when in fact said promissory note was, at the time of making the same, intended by the plaintiff and defendant to be dated on the.....day of....., 18..., and delivered said note to plaintiff, and thereby promised to pay to the plaintiff [*or order*] the sum of \$....., with interest, on the.....day of....., 18... The following is a copy of said note:

[*Copy note.*]

2. Said note is now due and payable, yet the said defendant has not paid the same nor any part thereof.

No. 14.

On Note Payable by Installments for one Installment Due.¹

1. The plaintiff complains of the defendant for that on the day of....., 18..., the defendant made and delivered to the

¹ See Chitty Pl., Vol. II., 121.

plaintiff a promissory note in writing, in the words and figures following, to-wit:

[*Copy note.*]

2. The sum of \$..... is now due and payable on the installment on said note with interest from the day of....., 18..., yet said defendant has not paid the same nor any part thereof.

No. 15.

On Note Payable by Installments where all Subsequent Installments are to Become Due upon Default in Payment of Any.

1. [*As in preceding form.*]

2. Said note contains a provision that in case default is made in the payment of any installment when it becomes due, then the whole of said note shall thereupon become due and payable.

3. On the.....day of....., 18..., the.....installment on said note became due and payable, which the defendant has wholly failed to pay, whereby the whole of said note has become due.

4. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

No. 16.

On Two Notes, one being Partly Paid.

First cause of action.

1. The plaintiff complains of the defendant for that said defendant, on the.....day of....., 18..., made and delivered to the plaintiff a promissory note in writing, in the words and figures following, to-wit:

[*Copy note.*]

2. On the.....day of....., 18..., the defendant paid to plaintiff on said note the sum of \$....., and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18...

Second cause of action.

3. [*Copy first paragraph.*]

4. No part of which has been paid, and there is now due the plaintiff from the defendant upon said notes the sum of \$.....

[*aggregate principal*], with interest upon \$..... from the day of, 18..., and with interest on \$....., from the day of....., 18...

No. 17.

On a Note Payable.....Days after Sight.

1. The plaintiff complains of the defendant for that on the..... day of....., 18..., said defendant made and delivered to the plaintiff a promissory note in writing, in the words and figures following, to-wit:

[*Copy note.*]

2. Said note was duly presented to said defendant on the..... day of....., 18..., and payment thereof demanded, which was refused.

3. No part of said note has been paid, and there is now due to the plaintiff from the defendant thereon the sum of \$....., with interest from the.....day of....., 18...

No. 18.

Indorsee v. Indorser on Note Payable at a Particular Place.

1. The plaintiff complains of the defendant for that on theday of....., 18..., at....., one, C. D., made and delivered to E. F. a promissory note in writing, in words and figures following, to-wit:

[*Copy Note.*]

2. On the.....day of....., 18..., said E. F. indorsed said promissory note in the words following: "Pay A. B. or order. E. F.", and delivered the same to the plaintiff.

3. On the day said note became due it was duly presented at [*Messrs. Blank & Co.'s bank*], and payment thereof demanded, which was refused, and said note was thereupon protested for non-payment, of all which said defendant, on the day of, 18..., was legally notified.

4. Said E. F. is liable on said note as indorser.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

No. 19.

On Note Payable to Bearer.

1. The plaintiff complains of the defendant for that on theday of, 18..., said defendant made and delivered to A. B. a promissory note in writing in the words and figures following, to-wit:

[*Copy note.*]

2. On or about the.....day of....., 18..., the plaintiff, for a valuable consideration, became the owner of said note, and is entitled to receive the money therein promised.

3. No part of said note has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

No. 20.

On Note Indorsed for Residue after Part Payment.

1. The plaintiff complains of the defendant for that on theday of....., 18..., C. D. made and delivered to E. F. his certain promissory note in writing of that date, as follows: "\$1000. "LINCOLN, NEB., January 1, 1880.

"Ninety days after date for value received I promise to pay E. F. or order the sum of \$1,000, with interest.

"C. D."

2. That on the.....day of....., 18..., said C. D. paid E. F. on said note the sum of \$500 and no more; that on the.....day of....., said E. F. indorsed said note as follows: "Pay to the order of G. H. E. F.", and delivered the same to G. H.

3. That on the.....day of....., 18..., said G. H. indorsed said note as follows: "G. H.", and delivered the same to the plaintiff.

4. That on the.....day of....., 18..., said note was duly presented to said C. D., and payment thereof demanded, which was refused, of all which said G. H. and E. F. had due notice.

5. Said E. F. and G. H. are liable on said note as indorsers.

6. No part of said note, except said sum of \$500, has been paid, and there is now due thereon from the defendants to the plaintiff the sum of \$....., with interest from the.....day of, 18....

No. 21.

On Note made in Another State to Recover the Interest of that State.

1. The plaintiff complains of the defendant for that on theday of....., 18..., the defendant made his certain promissory note of that date, at Denver, Colorado, and delivered the same to the plaintiff. The following is a copy of the note:

“DENVER, COLORADO, January 1, 1880.

“Ninety days after date for value received I promise to pay A. B. or order, at the First National Bank, in Denver, the sum of \$500, with interest at the rate of 12 per cent.

“C. D.”

2. The plaintiff alleges that by the laws of Colorado he is entitled to recover interest on said note at the rate of 12 per cent per annum.

3. No part of said note has been paid, and there is now due thereon the sum of \$500, with interest at twelve per cent from the day of....., 18....

No. 22.

Indorsee v. Indorser, in case of Failure to give Notice for Want of Funds.

1. The plaintiff complains of the defendant, E. F., for that on the day of, 18..., one, C. D., made his promissory note in writing of that date, and delivered the same to the defendant. The following is a copy of the note:

“NORTH PLATTE, NEB., Dec. 1, 1879.

“Six months from date, for value received, I promise to pay E. F. or order the sum of \$600, with interest.

“C. D.”

2. On the first day of January, 1880, the said E. F. indorsed said promissory note in the words following: “Pay to the order of A. B. E. F.”, and delivered the same to the plaintiff.

3. The plaintiff alleges that at the time said C. D. made said promissory note, and from that time until it was presented to him for payment, the said C. D. did not have any funds nor ef-

fects of E. F. in his hands belonging to E. F., nor had he received any consideration for said note, but made said note at the request and for the accommodation of said E. F., who is the principal debtor thereon. The said E. F. therefore has not sustained any damage by reason of want of notice of the non-payment of said note by said C. D.

4. Said E. F. is liable as indorser on said note.

5. No part of said note has been paid. There is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18....

No. 23.

When Maker could not be Found.

1 and 2. [*As in preceding form.*]

3. When said note became due and payable, to-wit: on the day of, 18..., diligent search was made for the said C. D. at [*the place of payment*] and elsewhere, to-wit: at, in order that the said promissory note might be presented to him for payment thereof, but the said C. D. could not on such search be found, nor did the said C. D. then or at any time before or since pay or cause to be paid the said sum of money in said promissory note specified, or any part thereof, but has wholly failed and neglected to do so, of all which the said defendant afterwards, to-wit: on the day of, 18..., had due notice.

4. No part of said note has been paid, and there is due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18....

No. 24.

By Executor or Administrator of Payee v. Administrator.

It is sufficient to allege generally that the plaintiff or defendant is an executor, administrator, or guardian, as the case may be, without setting out the letters testamentary or the appointment of the administrator or guardian. The statement in the petition of the *capacity* in which a person sues will be taken as true if not denied.

<p>A. B., as executor of the last will and testament of E. F., deceased, plaintiff,</p>	}	v.	<p>C. D., as administrator of the es- tate of G. H., deceased, defend- ant.</p>
---	---	----	---

1. The plaintiff complains of the defendant for that on theday of..... 18..., G. H., in his lifetime made his certain promissory note in writing of that date and delivered the same to E. F. The following is a copy of said note:

“WAHOO, NEB., Oct. 1, 1878.

“Six months after date, for value received, I promise to pay E. F., or order, the sum of six hundred dollars, with interest.

“G. H.”

2. That since the making of said note, to-wit: on the..... day of....., 18..., said E. F. departed this life, leaving a last will and testament, which was duly admitted to probate, by which the plaintiff became and now is the executor of said will.

3. That after the making of said promissory note, and before the commencement of this action, to-wit: on the.....day of....., 18..., the said G. H. died, and said defendant was, on the..... day of....., 18..., duly appointed administrator of his estate.

4. That said claim was duly presented to the county court ofcounty, Nebraska, and duly allowed against said estate.

5. That the time limited by the court for the payment of debts against said estate by said administrator expired on the..... day of....., 18..., yet said defendant has not paid said claim nor any part thereof, although he has sufficient assets of said estate in his hands to pay the same.

6. There is now due the plaintiff thereon from the defendant the sum of \$.....

If the action is brought on the official bond of the executor or administrator, see *post* “Bonds.”

All debts against an estate, unless secured by a lien upon real or personal property, must be filed in the county court and allowed against the estate to be a charge thereon, unless an action is brought by the executor or administrator against the claimant,

in which case the claim may be used as a counter-claim or set-off.

An executor or administrator, duly appointed in any other state or country, may commence and prosecute any action or suit in any court of this state in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may be permitted to sue.¹

No. 25.

*Bills of Exchange, Payee v. Acceptor.*²

1. The plaintiff complains of the defendant for that on theday of....., 18..., C. D. drew his certain bill of exchange of that date, and delivered the same to the plaintiff, and thereby then and there requested the defendant, two months after the date thereof, to pay the plaintiff, or his order, the sum of \$500. The following is a copy of said bill with indorsements thereon:

[*Copy bill.*]

2. Said bill was duly accepted by said defendant on the..... day of....., 18..., yet he has failed to pay the same or any part thereof.

3. There is now due from the defendant to the plaintiff on said bill the sum of \$500, with interest from the.....day of....., 18...

4. The plaintiff therefore prays judgment for the sum of \$500, with interest from the.....day of....., 18..., and costs of suit.

No. 26.

*Payee v. Drawer and Acceptor.*³

1. The plaintiff complains of the defendant for that on theday of....., 18..., C. D. drew his certain bill of exchange of that date and delivered the same to the plaintiff, and thereby then and there requested the defendant, ninety days after the

¹ G. S., 342.

² *Days of Grace.* All negotiable instruments, whether sight or time, are entitled to three days of grace, and an action instituted before the expiration of the days of grace is premature and cannot be maintained. *Raymond v. Green*, 9 Neb., 295.

³ When a bill of exchange is protested for non-acceptance or non-payment the drawer and indorsers are liable to twelve per cent damages if drawn upon any person or corporation without the United States, and six per cent if drawn upon any person or corporation without the State and within the United States. G. S., 427.

date thereof, to pay the plaintiff or his order the sum of \$300. The following is a copy of said bill, with the indorsements thereon:

[*Copy bill.*]

2. Said bill was duly accepted by said defendant on the..... day of....., 18....

3. On the day said bill of exchange became due and payable it was duly presented to the said E. F., and payment thereof demanded, which was refused [*and was duly protested*¹], of all which the said C. D. was duly notified.

4. Said C. D. is liable on said bill as drawer, and E. F. as acceptor.

5. No part thereof has been paid, and there is due from defendants to the plaintiff thereon the sum of \$....., with interest from the day of....., 18.... [*and also \$..... damages and costs of protest.*]

No. 27.

Payee v. Drawer for Non-payment.

1 and 2. [*As in preceding form.*]

3. On the day said bill of exchange became due and payable it was presented to said E. F., and payment thereof demanded, which was refused, of all which said C. D., defendant, had due and legal notice.

4. Said defendant is liable on said bill as drawer.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of.....18....

No. 28.

Payee v. Drawer for Non-acceptance.

1. [*As in No. 26.*]

2. On the.....day of....., 18..., said bill of exchange was duly presented to said E. F. for acceptance thereof, but the said E. F. refused to accept the same or to pay the money therein specified, of all which said defendant had then due notice.

3. No part of said bill has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

¹ If a foreign bill add "was duly protested."

No. 29.

Indorsee v. Acceptor, Drawer, and Indorsers.

1. The Plaintiff complains of the defendants, L. M., N. O., P. Q., and R. S., for that on the.....day of....., 18..., L. M. drew his certain bill of exchange of that date, and delivered the same to P. Q., and thereby then and there requested the said N. O., ninety days from the date thereof, to pay P. Q. or order the sum of \$1000. The following is a copy of said bill with the indorsements thereon:

[*Copy bill and indorsements.*]

2. Said bill of exchange was duly accepted by said N. O. on the.....day of....., 18....

3. On the.....day of....., 18..., the said P. Q. indorsed said bill of exchange as follows: "P. Q.", and delivered the same to R. S., who on the.....day of....., 18..., indorsed said bill as follows: "R. S.", and delivered the same to the plaintiff.

4. On the day said bill became due and payable it was duly presented to said N. O., and payment thereof demanded, which was refused, of all which the said L. M., P. Q., and R. S., afterward had due and legal notice.

5. The said L. M. is liable on said bill as drawer, the said N. O. as acceptor, and P. Q. and R. S. as indorsers.

6. No part thereof has been paid, and there is now due from the defendants to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

7. The plaintiff therefore prays judgment, etc.

No. 30.

Excuse for Non-presentment of Bill to Drawee.

1. The plaintiff complains of the defendant for that on the.....day of....., 18..., C. D. drew his certain bill of exchange of that date and delivered the same to the plaintiff, and thereby then and there requested E. F., ninety days from the date thereof, to pay the plaintiff or order the sum of \$500. The following is a copy of said bill with the indorsements thereon:

[*Copy bill and indorsements.*]

2. That at the time the said C. D. drew said bill of exchange, and from that time until said bill became due and payable, the

said E. F. had no effects whatever of the said defendant, nor would E. F. have accepted or paid said bill if presented to him for that purpose; of all which the said C. D. had full knowledge. The plaintiff therefore did not present said bill for acceptance or payment.

3. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest, etc.

4. The plaintiff therefore prays judgment, etc.

No. 31.

Where Drawer Countermands Bill.

1. [*As in preceding form.*]

2. The plaintiff alleges that before said bill became due and payable, to-wit: on or about the.....day of....., 18..., the said C. D., defendant, notified and instructed the said E. F. not to accept or pay said bill of exchange, therefore said bill was not presented.

3. No part of said bill has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

No. 32.

When Demand and Notice are Waived.

1. [*As in form 30.*]

2. On the.....day of....., 18..., the said A. B. indorsed said bill of exchange in the words following: "I waive demand and notice. A. B.", and delivered the same to the plaintiff, whereby the said A. B. waived the presentation of said bill to E. F. for payment, and notice of the non-payment thereof.

3. Said A. B. is liable on said bill as indorser.

4. No part of said bill has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18....

No. 33.

Where Drawee Could not be Found.

1 and 2. [*As in form 30.*]

3. The plaintiff alleges that on the day said bill of exchange became due, to-wit: on the.....day of....., 18..., diligent

search and inquiry was made for the said E. F. at [*Hastings, Nebraska*], in order that said bill of exchange might be presented to him for payment, but the said E. F. could not on such search and inquiry be found, and said bill was not paid, of all which the said defendant then had due and legal notice.

4. No part thereof has been paid, and there is now due the plaintiff thereon from the defendant the sum of \$....., with interest from the.....day of.....18...

No. 34.

*On an Acceptance Varying as to Time from the Bill.*¹

1. [*As in No. 26.*]

2. On the day of, 18..., the defendant, E. E., accepted the same payable at days after the date of said bill.
[*Continue as in No. 26.*]

No. 35.

Against Drawer and Acceptor for Honor.

1. [*As in form 25.*]

2. On the.....day of....., 18..., said bill was duly presented to.....for acceptance, but was not accepted [*if foreign bill say*], and was thereupon duly protested for non-acceptance, of all which the defendant, C. D., had due notice.

3. On the.....day of....., 18..., the defendant, G. H., accepted said bill for the honor of [*the drawer*].

4. On the day said bill became due it was duly presented to [*the drawee*], and payment thereof demanded, which was refused; said bill was thereupon presented to the defendant [*acceptor for honor*], but was not paid, and was thereupon duly protested for non-payment, of all which said defendant [*the drawer*] had due and legal notice.

5. No part of said bill has been paid, and there is now due thereon from the defendants to the plaintiff the sum of \$....., with interest from the.....day of....., 18...

No. 36.

Payee v. Drawer of Check on Bank.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant made and delivered to

¹ See *Green v. Raymond*, 9 Neb., 295.

the plaintiff a check in writing, of which the following is a copy:

"\$.....

"FREMONT, April 29, 1879:

"First National Bank of Fremont, Nebraska, pay A. B., or bearer, \$,..... "C. D."

2. On the day of, 1879, said check was duly presented to said bank for payment, but was not paid, of all which said defendant [*the drawer*] had due notice.

3. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 37.

Against Bank on a Certified Check.

1. The plaintiff complains of the defendant for that said defendant is a corporation duly organized as a national bank under the act of Congress of June 3, 1864, and the acts amending the same.

2. On the day of, 18..., one, E. F., made and delivered to the plaintiff a check in writing, of which the following is a copy.

[*Copy check.*]

3. On the day of, 18..., said defendant, by its duly authorized agent, accepted said check in writing and certified the same to be good.

4. On the day of, 18..., said check was duly presented to said bank for payment, and payment thereof was refused.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 38.

On a Note Payable on a Contingency.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant made and delivered to the plaintiff a promissory note in writing, of which the following is a copy:

"COLUMBUS, May 1, 1878.

"Two years after date, for value received, I promise to pay E. F. five hundred dollars, provided that before that time he ob-

tains and conveys to me a perfect title to lot ..., in block ..., in said city, which I have this day purchased from him. "G. H."

2. On the day of, 18..., and within two years from the date of said note, the plaintiff did procure and convey to said defendant a perfect title to said lot.

3. No part of said note has been paid, and there is due from the defendant to the plaintiff thereon the sum of \$.....

No. 39.

By Treasurer of an Unincorporated Association on a Note Payable to Former Treasurer.

1. The plaintiff complains of the defendant for that the Knights of Honor are an association of twenty persons in the town of, in this state, and at the time hereinafter mentioned E. F. was treasurer of said association.

2. On the day of, 18..., the defendant made and delivered to said E. F., as treasurer of said association, a promissory note in writing, of which the following is a copy:

[*Copy note.*]

3. Said note was given to said treasurer for the benefit of said association, and is owned by the members thereof in common.

4. The plaintiff is the present treasurer of said association, and as such may bring and maintain an action thereon for their benefit.

5. No part thereof has been paid, and there is due thereon from the defendant to the plaintiff, as such treasurer, the sum of \$.....

No. 40.

Note Payable in Chattels.

1. The plaintiff complains of the defendant for that on the day of, 18..., he executed and delivered to plaintiff his promissory note in writing, in the words and figures following:

"NORTH BEND, NEB., April 1, 1879.

"Six months from date for value received I promise to pay C. D. \$500 in corn, at twenty cents per bushel, to be delivered at his warehouse in said town.

"A. B."

2. Said defendant has not delivered said corn nor any part thereof, and there is now due from defendant to plaintiff on said note the sum of \$....., with interest from the.....day of, 18...¹

No. 41.

Bond for the Payment of Money.

The plaintiff complains of the defendant for that on the..... day of....., 18..., said defendant made and delivered to the plaintiff the following instrument in writing :

“Know all men by these presents that I, C. D., am held and firmly bound unto A. B. in the penal sum of \$1,000, for the payment of which well and truly to be made I hereby bind myself. Dated this.....day of....., 18...

“The condition of this obligation is such that if the above bounden C. D. shall well and truly pay to said A. B. or assigns the sum of five hundred dollars on or before the.....day of, 18..., with interest at the rate of...per cent, then this obligation to be void, otherwise to remain in full force and effect.

“C. D.”

No part of the sum due on said instrument has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18...

No. 42.

Negotiable Bond Payable to Bearer.

1. The plaintiff complains of the defendant for that on theday of....., 18..., said defendant, being a corporation duly organized under the laws of the State of....., made, sealed, and delivered to E. F., in pursuance of a resolution of its board of directors, an obligation in writing, of which the following is a copy:

[*Copy bond.*]

2. On the.....day of....., 18..., the plaintiff, for a valuable consideration, became the owner of said instrument, and is entitled to receive the money therein promised.

¹ If a demand is necessary by the terms of the note, or if the chattels are of such a character that in the absence of a contract as to place of delivery they must be delivered at the residence of the debtor, a demand must be *alleged*.

3. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the.....day of....., 18...

No. 43.

Municipal Bonds Payable to Bearer.

The plaintiff complains of the defendant for that on the..... day of....., 18..., said defendant was and still is a municipal corporation duly organized, that in pursuance of the vote of the electors of said....., at an election held therein on the.....day of....., 18..., authorizing the issuing of said bonds, said defendant made, sealed, and delivered to E. F. an obligation in writing, of which the following is a copy:

[*Copy bond.*]

[*Continue as in preceding form.*]

OFFICIAL BONDS.

An action on an official bond must be brought in the county in which the official resides and holds his office, but if brought in another county and he voluntarily appears and pleads to the merits of the case, he thereby waives all objections to the jurisdiction of the court. *Kane v. Union Pacific Railroad*, 5 Neb., 105.

The plaintiff must state the facts showing a *breach* in the conditions of the bond, otherwise the petition will state no cause of action.

Under section 643 of the code, an individual injured by a breach of the conditions of an official bond may maintain an action thereon in his own name. If the action is prosecuted on behalf of the *public* it must be prosecuted in the name of the obligee of the bond. *Albertson v. The State*, 9 Neb., 429. *Hunter v. Co. Commissioners*, 10 O. S., 515.

No. 44.

Official Bonds.

1. The plaintiff complains of the defendants for that at the general election held in.....on the.....day of....., 18..., C. D. was elected to the office of, for the period of year... from theday of....., 18...

2. On the day of, 18..., said C. D., as principal, and and, as sureties, made and delivered to the of an obligation in writing, of which the following is a copy:

[*Copy bond.*]

3. On the day of, 18..., said obligation was duly approved by the of said, and said [*name of officer*], defendant, thereupon duly entered upon the duties of said office, and at the time of committing the wrongs hereinafter complained of was exercising said duties.

4. [*State in detail the injuries complained of. It must appear that the injuries complained of were done virtute officii. See Huffman v. Kopplekom, 8 Neb., 344.*]

5. Said defendant did not faithfully perform the duties of said office as required by law, but has wholly failed to perform the same, to the damage of plaintiff in the sum of \$.....

No. 45.

Attachment Bond.

1. The plaintiff complains of the defendants, C. D., E. F., and G. H., for that on the day of, 18..., said C. D. commenced in the court of an action by attachment against the plaintiff for the recovery of money, alleging in the affidavit therefor, and as a ground for said attachment [*that the plaintiff herein had fraudulently contracted the debt upon which said suit was brought*]. [*State the grounds.*]

2. At the same time said defendants executed and delivered to the clerk of said court the following undertaking: [*copy undertaking in full, with signatures*], which was approved by the said clerk.

3. Said clerk thereupon, by direction of said C. D., issued an order of attachment, in the words and figures following [*copy order of attachment*], which was levied upon the following goods and chattels of plaintiff [*describe goods*], which goods were taken into the custody of said sheriff and retained by him for the space of days.

4. The plaintiff further alleges that said order of attachment

was wrongfully sued out,¹ and no just ground existed for issuing the same, and the statement in said affidavit as ground therefor was and is false and untrue.

5. On the day of, 18..., said attachment was dissolved and the proceeding dismissed by order of court, at the costs of the said C. D.

6. At the time said order of attachment was levied upon the goods of plaintiff he was engaged in the business of at the town of And by reason of said levy and the removal of said goods by the officer, under said order, the business of the plaintiff was interrupted for the period of days [*state special injuries*], and his credit greatly impaired, whereby he has sustained damages by reason of the wrongful suing out of said attachment in the sum of \$....., no part of which has been paid.

No. 46.

Administrator's Bond.

1. The plaintiff alleges that on or about the.....day of....., 18..., C. D. departed this life, and that E. F., on or about the day of....., 18..., was duly appointed administrator of his estate, who thereupon, with G. H. as surety, executed and delivered to the county judge of county, Nebraska, the following obligation in writing:

[*Here copy bond with signatures.*]

2. That said instrument was duly approved by the county judge of said county, and said E. F. thereupon entered upon the duties of said administration and collected a large amount of assets belonging to said estate.

3. That on the day of....., 18..., said E. F. settled in said county court his administrative accounts, and said court found that there remained in his hands, after the payment of all debts and expenses, the sum of \$....., which he was required to pay to the heirs of said estate.

4. The plaintiff further states that the heirs of said estate are as follows:,,, and that he, as an heir thereof, is entitled to one-third part of said sum, and that

¹*Eaton v. Bartscherer*, 5 Neb., 469.

on the day of, 18..., he demanded of E. F. said sum of \$....., which he refused to pay, or any part thereof.

5. There is therefore due from the defendants to the plaintiff thereon the sum of \$.....

No. 47.

Conversion by Administrator.

1 and 2. [*As in preceding form.*]

3. The following goods and chattels [*describe the goods, chattels, rights, or credits which it is claimed came into the possession of the administrator but were not entered in the inventory*], belonging to said estate came into the possession of said administrator, which assets the said E. F. neglected and refused to return in the inventory of property belonging to said estate, but has converted the same to his own use and has wholly neglected and refused to account for the same, either in his accounts or settlement with said court.

4. The plaintiff is one of the heirs and legal distributees of said estate.

5. The plaintiff has sustained damages by reason of the wrongful conversion of said property in the sum of \$.....

No. 48.

Bond to Indemnify Sheriff or Constable.

1. The plaintiff complains of the defendant for that on the day of 18..., said defendant caused an execution to be issued out of the court of county upon a judgment before that time recovered by said defendant in said court against C. D., which execution was delivered to plaintiff, who then and at the return thereof was sheriff [*or constable*] of said county.

2. The plaintiff, as said officer, at the request of the defendant, levied said execution upon certain personal property, as the goods and chattels of said C. D., but which goods were afterwards claimed by one, E. F.

3. Said defendant, in consideration of and upon the promise of plaintiff to sell said goods, executed and delivered to plaintiff an obligation in writing, of which the following is a copy:

[*Copy bond.*]

4. In consideration of said bond the plaintiff sold said goods

under said execution and paid over the proceeds of said sale, less the costs, to the defendant.

5. On the day of, 18..., said brought an action against the plaintiff for the conversion of said goods so levied upon under said execution, and on the.....day of....., 18..., recovered judgment against plaintiff for the sum of \$....., as the value of the goods, and \$....., costs, and plaintiff was compelled to pay the sum of \$....., necessary expenses in defending said action.

6. On the day of, 18..., said defendant was duly notified of the pendency of said action, and afterwards that judgment had been rendered against the plaintiff in said cause, but he has failed and neglected to pay the same and save the plaintiff harmless, as provided in said bond.

7. The plaintiff has sustained damages in the premises in the sum of \$....., no part of which has been paid.

NO. 49.

On Bond for the Fidelity of Clerk or Cashier.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, upon consideration that plaintiff would employ one,, as clerk [or cashier], made and delivered to the plaintiff an obligation in writing, of which the following is a copy:

[*Copy bond.*]

2. The plaintiff thereupon employed said as clerk at a salary of \$..... per....., who continued in the employment of plaintiff until the day of, 18....

3. During said period said, as such clerk [or cashier], received money belonging to plaintiff to the amount of \$....., for which he has not accounted to him, and which he has converted to his own use.

4. No part of said sum has been repaid, and the plaintiff has sustained damages in the premises in the sum of \$.....

NO. 50.

On Undertaking in Replevin.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant commenced an action in

the district court of county against the plaintiff to recover possession of certain specific personal property.

2. That an order of delivery was issued in said cause, under which certain goods and chattels, of the value of \$....., were taken from the possession of the plaintiff and delivered to the defendant upon his making and delivering to the sheriff, for the use of the plaintiff, an undertaking in writing, of which the following is a copy:

[*Copy undertaking*].

3. Upon the delivery of said undertaking the goods and chattels taken under said order of delivery were delivered to the defendant.

4. On the trial of said cause in said court on the day of, 18... the jury found the right of property and the right of possession of the same, at the commencement of the action, to be in this plaintiff, and found the value of said property to be the sum of \$....., whereupon judgment was rendered against the defendant herein, that the plaintiff herein have a return of said goods and chattels, or in case a return could not be had, to recover from said defendant the sum of \$.....

5. Said defendant has not returned nor offered to return said property, and no part of said judgment has been paid.

6. On the day of, 18..., an execution was issued to the sheriff of county on said judgment, in favor of this plaintiff, which was returned wholly unsatisfied.

7. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 51.

*On an Undertaking for an Injunction.*¹

1. The plaintiff complains of the defendants for that on the day of, 18..., the defendant, C. D., commenced an action in the district court of county against the plaintiff, and obtained a temporary order of injunction therein to restrain the plaintiff from [*state the object of the injunction*].

2. Upon the granting of said injunction the defendant gave

¹ See *Smith v. Gregg*, 9 Neb., 212.

an undertaking in writing, signed by as surety. The following is a copy of said undertaking: [*copy undertaking*], which undertaking was duly approved by the clerk of the said district court.

3. That on the trial of said cause, on the day of, 18..., it was finally decided by the court that said injunction ought not to have been granted, and the same was dissolved.

4. The plaintiff at the time of granting said injunction was engaged in [*state the special circumstances showing injury*], by reason of which the plaintiff sustained damages in the sum of \$....., and the plaintiff was compelled to expend the sum of \$....., as attorney fees, in procuring a dissolution of said injunction, no part of which has been paid.

No. 52.

On Arbitration Bond for Refusal to Comply with Award.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant made and delivered to the plaintiff a bond conditioned to abide the award of E. F. and G. H., in a matter wherein certain differences between the plaintiff and defendant were submitted to said arbitrators for their determination.

The following is a copy of said bond:

[*Copy bond.*]

2. On the day of, 18..., said arbitrators undertook said arbitration, after due notice to the plaintiff and defendant, and after hearing the evidence offered by the parties, on the day of, 18..., made and published their award in writing upon the matter submitted to them, a copy of which on said day was served upon the defendant.

The following is a copy of said award:

[*Copy award.*]

3. [*If the award provides that the plaintiff shall perform certain acts as a condition precedent, allege their performance.*]

4. [*Allege the breach in the conditions of the bond, specifying particularly the acts or omissions complained of*], by reason of which the plaintiff has sustained damages in the sum of \$.....

No. 53.

Liability of Common Carriers for Loss and Destruction of Property.

1. The plaintiff complains of the defendant for that said defendant, at the times hereinafter mentioned, was a common carrier of goods and livestock for hire from, to

2. On the day of, 18..., the plaintiff delivered to defendant, and it then received as such carrier horses of the plaintiff, of the value of \$....., to be safely and securely conveyed by said defendant from said to said, there to be safely delivered to one,, for a certain reward to be paid to said defendant.

3. Said defendant did not safely convey and deliver said horses as it had undertaken to do, but on the contrary conducted itself so carelessly in and about carrying and transporting the same that at, on the line of defendant's railroad, between said and, one of the cars containing nineteen of plaintiff's horses was thrown from the track, and overturned and partially destroyed, in consequence of which of said horses were killed, and the others were bruised and greatly injured, to the damage of plaintiff in the sum of \$.....

No. 54.

For Losing Goods. Neglect.

1. [*As in preceding form.*]

2. On the day of, 18..., the plaintiff delivered to defendant, and it received as such carrier certain goods and chattels belonging to plaintiff, to-wit: [*describe them*], of the value of \$....., to be safely and securely conveyed by said defendant from said to, there to be safely delivered to, for a certain reward to be paid to said defendant.

3. Yet said defendant neglected its duty and did not take care of said goods, nor safely carry and deliver the same as aforesaid, but wholly failed and neglected to carry and deliver the same, whereby said goods were and are wholly lost to the plaintiff, to his damage in the sum of \$.....

¹ For a statement of the law as to the liability of common carriers see *A. & N. R. R. v. Washburn*, 5 Neb., 117.

No. 55.

For Failure to Deliver in a Reasonable Time.

1. [As in form No. 53.]

2. On the day of, 18..., the plaintiff delivered to the defendant, and it received as such carrier certain goods belonging to plaintiff, to-wit: [describe them], of the value of \$....., to be safely and securely conveyed by said defendant from said to, there to be safely delivered to, within a reasonable time, for a certain reward to be paid to defendant.

3. A reasonable time for the carriage and delivery of said goods has long since elapsed, yet the defendant did not take care of or safely carry said goods and chattels and safely deliver the same to said, but has wholly failed there or elsewhere to deliver the same, whereby they are wholly lost to the plaintiff, to his damage in the sum of \$.....

No. 56.

*For Breach of Contract for Transportation of Goods Over Other Railroads
Forming with its Own a Continuous Line.*

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant was a common carrier of goods for hire, and had connections with forwarding lines by other railroads and by steamboats, whereby freight was carried from and delivered in

2. That at that time the defendant assumed and contracted as such common carrier to send freight from to

3. That plaintiff delivered to defendant as such carrier, and defendant received at the [describe goods], belonging to the plaintiff, of the value of \$....., to be carried from to, and there delivered to within a reasonable time, for a certain reward to be paid to defendant.

4. [Copy 3, in preceding form.]

No. 57.

*Personal Injuries from Neglect to Provide Necessary Conveniences at Stations to
Enter the Cars.*

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant was in the occupancy of and operating the, railroad, a line of road running from

..... to, and was engaged in the business of carrying passengers over the same for hire and reward.

2. That at said time the plaintiff was a passenger at the special instance and request of defendant upon said road to be carried from the station thereon at to the city of on said road, for a certain reward paid to the defendant.

3. That said defendant thereby promised and agreed to carry her safely from said to, and was bound thereby to furnish her suitable and proper means whereby she could safely enter the car of the defendant, and was bound to stop its train a sufficient length of time to enable her to get upon the same.

4. Yet said defendant totally neglected and failed to perform its duties in that regard, and had furnished no platform nor depot at said station; that the ground was from three to four feet below the lowest step of the car, and a ditch impeded ingress into the car, and that said defendant had supplied no conveniences for persons desiring to take passage at that point, and that as she was about to get upon the car the conductor of the defendant gave her such slight assistance in climbing up, and so carelessly assisted her, that in getting on the steps of the car she was thrown around on the side of the car, and through the haste of the defendant in starting its train she was bruised, strained, and injured in her back and spine, and by reason thereof has permanently lost the use of her lower limbs, to her damage in the sum of \$....., etc.

The above is in substance the petition in the case of the *Railroad v. Peoples*, 31 O. S., 537.

No. 58.

Against R. R. Co. for Collision with Plaintiff's Buggy at a Crossing.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant was a corporation duly organized under the laws of, and owned and operated a certain railroad known as, running from to, and was a common carrier of passengers for hire upon said road.

2. That on said day the plaintiff was traveling in a buggy drawn by two horses upon the public highway leading from to, in county, which crosses said railroad, and while

in the act of crossing defendant's railroad track he was struck by defendant's locomotive, run by defendant, and thrown from his buggy, and was seriously and permanently injured [*state specifically the injuries received*], without any fault on his part.

3. That the train causing the accident consisted of a locomotive and one car; that it was an irregular train, and in approaching said crossing was run with great speed, and omitted to give any signal by bell or whistle of its approach, and was not run upon any time fixed for trains passing that point.

4. That plaintiff knew the time for trains, and knew that none was then due at that place, and relied upon that fact in part for safety.

5. That the defendant, in the construction of its railroad, made an excavation for its road bed, and that its track is some fifteen feet below the natural surface at said crossing, and for a long distance on either side of it; that in constructing said railway the plaintiff removed the dirt from the highway and dug it down to a level with the railroad track, causing it to descend to said track, leaving high banks on either side of it, which banks on the side of the railroad and highway were obscured by bushes and foliage; by reason of all which the highway is greatly impaired in its usefulness, and the crossing is of a highly dangerous character.

6. By reason of said injuries the plaintiff was sick and unable to perform labor for the period of, months, and necessarily expended for physicians' and other services the sum of \$....., and his health is greatly impaired, and he has sustained other injuries, in all to his damage in the sum of \$.....

The above is in substance the petition in the case of *C. C. C. & I. R. R. Co. v. Elliott*, 28 O. S., 341.

NO. 59.

Injury to Passenger on Street Car.

1. [*As in preceding form.*]

2. On said day the plaintiff, at the special instance and request of said defendant, became and was a passenger on said railroad to be carried safely from the intersection of and streets to street on said road, for a certain reward paid to the defendant.

3. While a passenger on said car, as aforesaid, and desiring to leave the same upon reaching said street, the plaintiff notified the driver thereof, who was then the servant of said defendant, and the only person in charge of the same, to stop said car for that purpose.

4. Thereupon said defendant, by its servant, did stop said car as requested, and while plaintiff was in the act of leaving the same, and without negligence on her part, said defendant, by its servant having control thereof, did so negligently and unskillfully control and manage said car and the horses and brake thereto attached, that said car was suddenly and violently, and without notice or warning to plaintiff, started forward and along the track of said railroad, thereby violently throwing plaintiff upon said track and against said car, by means whereof the plaintiff was greatly and permanently injured, etc. [*state particular injuries received*], to the damage of the plaintiff in the sum of \$.....¹

No. 60.

Against Railroad Co. for Killing Stock where the Road is not Fenced.

1. The plaintiff complains of the defendant for that said defendant is a corporation organized under the laws of.....

2. That on or about the day of, 18..., said defendant was operating a railroad through county, said road having been open for use for more than six months in said county, and while so operating the same at the time above stated, at a place on said road therein where it was required by law to fence its track, but had failed to do so, said defendant, by its agents and employees, ran an engine and train of cars over and upon [*describe the stock injured or killed*], being the property of plaintiff, and of the value of \$....., by reason of which said stock was killed [*or permanently injured*].

3. On the.....day of....., 18..., he served a written notice and affidavit, copies of which are hereto attached, upon [*any officer of the company, or any station agent or ticket agent, em-*

¹ The above is the substance of the petition in the case of *Doolittle v. Omaha Horse Railroad Co.*, 7 Neb., 481.

ployed in the management of its business in the county], setting forth the killing [*or injury*] to said stock, and claiming that the value of the property destroyed [*or injured*] was the sum of \$.....

4. That more than ten days have elapsed since the service of said notice, yet said defendant has not objected to the value of said property as set forth in said notice, but has neglected and refused to pay the same or any part thereof. The plaintiff has sustained damages in the premises in the sum of \$.....

NO. 61.

Action under Civil Damage Law.¹

1. The plaintiff, as administrator of, late of, deceased, duly appointed according to law, complains of the defendant for that said, while in life, to-wit: on the day of, 18..., and before that time, was in the employ of the defendant, in said county of, and on the day and year aforesaid was employed as a by said company on the steam ferry boat then and there used by said defendant in connection with the railroad of said defendant in the carriage and transportation of passengers and freight across the river at

2. While said, now deceased, was so engaged under the directions of the agents and superintendents of said defendant, the said, by the wrongful act, neglect, and default of the said agents and superintendents aforesaid, while they were concerned in managing and conducting the business of said defendant, was bruised and mangled by the machinery of said boat, and was thereby thrown into the water and was drowned, the death of said being caused by the wrongful act, neglect, and default of said defendant, and without the fault of said

3. Plaintiff further alleges that,,,, are next of kin and brothers and sisters of said, deceased, the said leaving no widow and having no children or child, and are the heirs at law of said, deceased, and that they have sustained damages by reason of the aforesaid

¹ G. S., 272-3. Swan's Rev. Stat. of O., 707, 708.

wrongful act, neglect, and default of said defendant in the sum of \$.....¹

No. 62.

*Employee v. Company in Case of Collision.*²

1. The plaintiff complains of the defendant for that before and on the day of, 18..., said defendant was possessed of a certain railway running from to, in the state of, and was possessed of two locomotives and trains of cars attached thereto, the one thereof running from to and back again the ensuing day, and the other thereof also running from to and back again the ensuing day.

2. Said locomotives, with their respective trains, were required to meet and safely pass each other at by the express direction and arrangement of the defendant.

3. At and before the time above stated, and at the time the injuries hereinafter stated occurred, the plaintiff was employed by the defendant as an engineer upon one of said locomotives, for a certain reward agreed upon by plaintiff and defendant, and was required by said regulations of said defendant to stop the locomotive in his care and control at, and there safely pass the other locomotive above described.

4. The defendant on the day of, 18..., changed the place of meeting of the last mentioned locomotives from to, said change to take effect on the ensuing day, to-wit: on the day of, 18..., without giving the plaintiff notice of said change, whereby, while the plaintiff was proceeding in the capacity of engineer of said locomotive, with the train thereto attached, from to, on the day of, 18..., according to the previous express direction, orders, and arrangement of said defendant, and while between and, on said railroad, the other of the said locomotives, without any fault on the part of plaintiff, ran against and came in collision with that upon which the plaintiff was engineer and

¹ The above is the substance of the petition in the case of *Lyons v. C. T. R. R. Co.*, 7 O. S., 338, under the civil damage law, and the petition was held sufficient to entitle the plaintiffs to recover.

² This is in substance the declaration in the case of *Little Miami R. R. Co. v. Stephens*, 20 Ohio, 416, 417.

crushed the same, whereby the plaintiff was scalded, burned, and wounded, and was sick for the period of months, to his damage in the sum of \$.....

No. 63.

Postal Clerk v. Railroad.

1. The plaintiff complains of the defendant for that said defendant is a corporation duly organized under the laws of the state of, and is operating a railroad from to, and is a common carrier of passengers and freight for hire upon said railroad.

2. On or about the day of, 18..., said defendant entered into a contract with the United States, by which, for a stipulated consideration, said defendant agreed to transport upon the cars of said railroad the mail, and postal clerk, or mail agent, of the United States upon said line.

3. On the day of, 18..., and during the existence of said contract, the plaintiff was postal clerk, or mail agent, of the United States and in the employ of the same on said line, and as such was received as a passenger in the cars of said defendant, in pursuance of said contract to be by said defendant safely and with due care carried therein from the said to

4. Said defendant did not safely and with due care carry the plaintiff as such passenger, but the defendant, not regarding its duty in the premises, negligently and without proper care provided and permitted to be used on the car in which plaintiff was being conveyed [*describe defect*], which was defective and unsound, thereby rendering the car unfit for use and entirely unsafe for said purpose, of all which said defendant had, or could have had by proper care and inspection, due notice.

5. While said car was proceeding from said to, and while said plaintiff was such passenger therein, said car, through the defect in, and through the carelessness and want of proper care of said defendant, was thrown from said railroad track and [*state specifically the injuries received*], whereby the plaintiff has sustained damages in the sum of \$.....¹

¹ The above can readily be changed to apply to ordinary passengers.

No. 64.

Against Railroad Company for Personal Injuries.

1. [As in preceding form.]

2. On the day of, 18..., the plaintiff purchased from the defendant a ticket entitling him to a safe passage on said railroad from to, and thereupon entered and became a passenger on the cars of the defendant on said railroad.

3. While the plaintiff was a passenger as aforesaid, a collision, caused by defendant's negligence, occurred between the car in which plaintiff was riding and another car of the defendant, by reason of which the plaintiff was greatly injured and had his right arm broken, and was for a long time sick, and was compelled to expend the sum of \$..... for medical services and attendance. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 65.

Negligently Permitting the Escape of Fire from Locomotives.

1. The plaintiff complains of the defendant for that at the times hereinafter mentioned the defendant was and now is a duly incorporated railroad company, owning and operating a railroad, through county, its right of way being one hundred feet in width along the line of said road.

2. Said railroad is located near the premises of plaintiff, in said county, and on the day of, 18..., said defendant, contrary to its duty in that regard, carelessly and negligently omitted to keep said right of way free and clear from dry and combustible materials, but negligently permitted large quantities of dry grass and weeds to accumulate over and upon its said track and right of way, near the premises of plaintiff.

3. On said day the servants, agents, and employees of said defendant, in operating and running its engines over said line of road at or near the premises of plaintiff in said county, negligently and carelessly permitted said engines to cast out sparks and coals of fire therefrom into the dry grass and other combustible material on defendant's right of way and set fire thereto, which spread on to and over the said lands of plaintiff, to-wit: [describe extent], the fire being continuous, and thereon burned

up and destroyed [*describe property*], the property of the plaintiff, without any fault or negligence on the part of the plaintiff, to his damage in the sum of \$.....¹

No. 66.

Against Warehousemen for not Forwarding Goods.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant was a forwarding agent at the town of, and as such agent kept a warehouse for the reception of goods delivered to him to be forwarded.

2. Thereupon on said day said plaintiff, at the request of defendant, delivered to said defendant at said warehouse the following goods and chattels, to-wit: [*describe them*], the property of plaintiff, of the value of \$....., to be by said defendant safely kept in said warehouse until the day of, 18..., and then shipped on for the purpose of being carried to, for a reasonable reward, to be paid to said defendant. In consideration whereof said defendant agreed to safely keep and ship said goods at the time and in the manner above stated.

3. The defendant then received said goods and chattels for the purpose aforesaid, and could have shipped the same at the time and in the manner provided in said agreement, but neglected to deliver said goods to to be carried to for a long period, to-wit: months, by reason of which delay, through the negligence and carelessness of said defendant, said goods have greatly depreciated in value, to-wit: in the sum of \$.....

The plaintiff has sustained damages in the premises in the sum of \$.....

If the goods have been lost, or were of a perishable nature and perished, state the facts and pray judgment accordingly.

No. 67.

To Recover Overcharge of Freight where there is a Special Agreement.

1. The plaintiff complains of the defendants for that said defendants, on the day of, 18..., entered into a con-

¹ The above is the substance of the petition in the case of *The B. & M. R. R. v. Westover*, 4 Neb., 269.

tract with the plaintiff to carry one thousand bushels of corn from to, and there deliver the same to plaintiff, for the sum of \$.....

2. In pursuance of said agreement the defendants received and carried said corn from to, but refused to deliver the same to plaintiff unless he would pay for transporting the same the sum of \$..... The plaintiff thereupon demanded said corn from the defendants, and offered to pay them the sum of \$....., the price agreed upon for transporting the same, which defendants refused to receive.

3. On the day of, 18..., the plaintiff, in order to obtain possession of said corn, was compelled to and did pay said defendants the sum of \$....., but paid the same under protest, and expressly denying their right to the same.

4. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 68.

To Recover Overcharge where there is no Special Agreement.

1. The plaintiff complains of the defendants for that at the time hereinafter mentioned said defendants were common carriers for hire, between and, and undertook to carry for the plaintiff one thousand bushels of corn from to, for a reasonable consideration.

2. In pursuance of said agreement the defendants received and carried said corn from to, but refused to deliver the same to plaintiff unless he would pay for transporting the same the sum of \$..... The plaintiff thereupon tendered said defendants the sum of \$..... for transporting the same, which is a reasonable consideration, and demanded said grain, which defendants refused to deliver.

3 and 4. [*As in preceding form*].

No. 69.

For Loss of Baggage.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the defendant was and now is a common carrier for hire, of passengers and baggage by railroad, between and

2. On the day of, 18..., the plaintiff purchased a ticket of the defendant entitling him, with his baggage, to be safely carried on said railroad from to, and the plaintiff thereupon became a passenger on said road, and delivered to said defendant his trunk, containing chattels of the value of \$....., to be conveyed by said defendant as plaintiff's baggage, which trunk defendant accepted for that purpose.

3. The defendant did not care for and convey said baggage, but through the negligence and carelessness of the defendant the same was wholly lost, to plaintiff's damage in the sum of \$.....

No. 70.

For Expelling Passenger from Cars.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the defendant was and now is a common carrier for hire of passengers and baggage between and

2. On the day of, 18..., the plaintiff purchased a ticket of the defendant entitling him to be safely carried on said railroad from to, and the plaintiff thereupon became a passenger on said railroad, and took his seat in the cars of the defendant, to be carried to

3. The defendant, by its agents and servants, not regarding its duty as such common carrier of passengers, at on the line of said road, and before reaching, unlawfully and with force and violence ejected and expelled the plaintiff from said cars of the defendant, and refused him permission to ride farther therein.

4. By reason whereof the plaintiff was bruised and wounded, and greatly delayed in his business, to his damage in the sum of \$.....

No. 71.

Against Carrier by Water for Negligence for Careless Loading.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, delivered to him the following goods, viz.: [*describe them*], belonging to plaintiff, of the value of \$....., to be by him securely

loaded for the plaintiff on the steamboat, then lying at the port of, for transportation from to, for a reasonable reward to be paid to said defendant.

2. The defendant did not securely load said goods on said steamboat, but on the contrary loaded the same in a negligent, careless manner, whereby they were greatly injured and cases entirely destroyed, to the damage of plaintiff in the sum of \$.....

Common counts. * It has been held in New York, in an action for the price of goods, that to describe the property simply as "goods," without in any way describing them, is sufficient. *Allen v. Patterson*, 7 N. Y., 476. And the same ruling has been had in California. *Abadie v. Carrillo*, 32 Cal., 172. *Wilkins v. Stedger*, 22 Id., 235. *Magee v. Kast*, 49 Id., 141. The codes of New York and California contain this provision: "It shall not be necessary to set forth in the pleading the items of an account therein alleged, but he shall deliver to the adverse party, within ten days after demand thereof in writing, a copy of the account, which, if the pleading be verified, must be verified," etc. The codes of Wisconsin, Minnesota, Colorado, Nevada, Florida, and North and South Carolina contain the same provision, while the codes of Nebraska, Kansas, Ohio, Kentucky, Indiana, Missouri, and Arkansas contain a provision that "if the action, counterclaim, or set-off is founded on an account, note, bill, or other written instrument, as evidence of indebtedness, a copy thereof must be attached to and filed with the pleading." See Bliss on Code Pleading, §§ 298-9.

The common counts, while sufficient to sustain a judgment, are not sufficiently definite in their statement of facts to comply with the requirements of the codes of the states last named. The facts of each case are to be stated as they actually exist, and not by mere formulas. This requires a *particular* and not a *general* statement. The common counts, therefore, are not applicable to this state, and if used, and objection is made, are subject to a motion to make definite and certain.

No. 72.

For Goods Sold and Delivered.

1. The plaintiff complains of the defendant for that at the times stated in the following account he sold and delivered to the defendant, at his request, the following goods, to-wit:

C. D. to A. B.	Dr.
March 1, 1879, to 1,000 lbs. brown sugar, at 9 cts. per lb.	\$ 90.00
April 1, 1879, to 2,000 lbs. Java coffee, at 30 cents.....	600.00
June 1, 1879, to 200 sacks flour, at \$2.50 per sack.....	500.00
	<hr/>
	\$1190.00

2. The prices affixed to the respective items in said account are the reasonable prices and value thereof, and said goods are of the aggregate value of \$1,190, no part of which has been paid. There is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 73.

Work and Labor.

1. The plaintiff complains of the defendant for that on the day of, 18..., he commenced work for the defendant, at his request, as [*describe character of services*], and continued in his employment for the period of ... months, for which the defendant promised to pay him the sum of \$.....

2. No part of said sum has been paid, and there is now due from the defendant to the plaintiff for said services the sum of \$....., with interest from the day of, 18...

No. 74.

Implied Contract.

1. The plaintiff complains of the defendant for that on the day of, 18..., he commenced work for the defendant, at his request, as [.....], and continued in his employment for the period of months, for which services the defendant promised to pay him, on demand, such sum as they were reasonably worth.

2. Such services were reasonably worth the sum of \$....., and on the day of !....., 18..., the plaintiff demanded of the defendant the payment of said sum.

3. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 75.

For Services as Master.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff entered into the service of the defendant, at his request, as master of the steamboat, and continued in his employment as such master for the period of months, for which the defendant promised to pay him the sum of \$.....

2. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 76.

By Father for Services of Minor Son.

1. The plaintiff complains of the defendant for that on the day of, 18..., one, E. F., commenced work for defendant, at his request, and continued in his employment for the period of months, which services were reasonably worth the sum of \$.....

2. Said E. F., at the time of performing said labor for defendant, was but sixteen years of age, and the plaintiff is the father of said E. F., and is entitled to recover for said services.

3. No part of said debt has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 77.

By Publisher of Newspaper for Advertising.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the plaintiff was and now is the proprietor of a newspaper called the, published at

2. On the day of, 18..., the plaintiff, at the defendant's request, published in said newspaper squares of advertisements for the defendant, which advertisements were, on the like request, continued in said newspaper for the period of months.

3. Said advertising was reasonably worth the sum of \$....., no part of which has been paid.

No. 78.

For the Value of Services and Material.

1. The plaintiff complains of the defendant for that on and between the day of, 18..., and the day of, 18..., the plaintiff, at defendant's request, furnished the material and repaired defendant's barn, situate in the town of

2. Plaintiff furnished to repair said barn:

4 M shingles, at \$4 per M.....	\$16 00
16 pounds of shingle nails, at 6½ cents per lb.....	1 00
Plaintiff performed four days' labor, at \$3 per day.....	12 00
	<hr/>
	\$29 00

3. That said services and materials were reasonably worth the sum of \$29. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 79.

For Services and Material at a Price Agreed Upon.

1. [As in preceding form.]

2. Plaintiff furnished to repair said barn 4 M shingles, at \$4 per M; 16 pounds of shingle nails, at 6½ cents per pound; and performed four days' labor, at \$3 per day, amounting in the aggregate to the sum of \$29, which sum the defendant promised to pay plaintiff. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 80.

For Passenger Fare.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, conveyed him on the steamboat, from to, for which said defendant promised to pay plaintiff the sum of \$.....

2. No part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 81.

As Agent.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff entered into the service of defendant at his request as agent [*state nature of duties*], and continued in his employment for the period of months, for which the defendant promised to pay him the sum of \$.....

2. No part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 82.

Factor, Broker, or Agent, to be paid by Commissions.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff entered into the service of the defendant, at his request, as agent, to sell and dispose of certain goods of about the value of \$....., then in a store-room in the town of, for which the defendant agreed to pay plaintiff the sum of \$.....

2. The plaintiff sold said goods for the benefit of the defendant, and has duly performed all the conditions of said contract on his part to be performed.

3. The defendant has not paid said sum nor any part thereof, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 83.

For Services as an Attorney.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at the defendant's request, commenced an action in the court of county in favor of the defendant, and against one,, and prosecuted the suit to final judgment, for which the defendant agreed to pay plaintiff the sum of \$....., no part of which has been paid.

2. There is now due from the defendant to the plaintiff for said services the sum of \$....., with interest from the day of, 18...

No. 84.

Services as Teacher.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at the defendant's request, commenced to teach the common school of said district and continued to teach said school for the period of months, for which said defendant agreed to pay him the sum of \$..... per month, amounting in all to the sum of \$.....

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff for said services the sum of \$....., with interest from the day of, 18...

No. 85.

As Physician or Surgeon.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, [*amputated the left arm of*], for which the defendant agreed to pay plaintiff the sum of \$.....

2. No part of the same has been paid, and there is now due from the defendant to the plaintiff, for such services, the sum of \$....., with interest from the day of, 18...

If several visits have been made the action may be brought on the *account*.

No. 86.

For Board and Lodging.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff commenced to board and lodge the defendant at his request, and continued the same until the day of, 18..., for which the defendant agreed to pay the plaintiff the sum of \$..... per week, amounting in the aggregate to the sum of \$.....

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

[*This may be stated in the form of an account.*]

No. 87.

For Injury to Household Furniture.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff let to hire and delivered to the defendant at his request the following household goods. [*describe them*], to be used by the defendant in, in the town of, from said date until the day of, 18..., the defendant to carefully use said furniture, and re-deliver the same to the plaintiff at the expiration of the term of hiring, in as good condition as when received, ordinary wear excepted.

2. The plaintiff further alleges that at the expiration of the time for which defendant had hired said goods, said defendant had failed to carefully use the same, but had broken and defaced [*state what articles*], said injuries being in excess of ordinary wear, whereby plaintiff has sustained damages in the sum of \$....., no part of which has been paid.

No. 88.

For Feed and Stabling.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, provided feed, stabling, care, and attendance for horses belonging to the defendant, and continued to furnish the same until the day of, 18..., for which the defendant promised to pay the plaintiff the sum of \$..... per week, amounting in the aggregate to the sum of \$.....

2. No part thereof has been paid. There is now due thereon from the defendant to the plaintiff the sum of \$....., with interest from the day of, 18...

No. 89.

For Herding or Pasturing Stock.

1. The plaintiff complains of the defendant for that he is indebted to the plaintiff for herding [*or pasturing*] head of cattle from the day of, 18..., to the day of, 18..., which services were rendered by plaintiff for defendant at his request, and for which he agreed to pay plaintiff the sum of \$..... per month, amounting in the aggregate to the sum of \$.....

2. No part of which has been paid, and there is now due thereon from the defendant to the plaintiff the sum of \$....., with interest from the day of, 18...

No. 90.

For Crop of Grain or Grass.

1. The plaintiff complains of the defendant for that he is indebted to the plaintiff for forty acres of corn sold and delivered by plaintiff to defendant on or about the day of, 18..., for which defendant agreed to pay plaintiff the sum of \$..... per acre, amounting in the aggregate to the sum of \$.....

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 91.

For Goods Delivered to a Third Person.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the plaintiff sold to the defendant the following goods: [*copy account*], for which the defendant agreed to pay plaintiff the sum of \$.....

2. At the special instance and request of said defendant, said goods were delivered to E. F.

3. No part thereof has been paid, and there is now due from defendant to plaintiff upon said account the sum of \$.....

No. 92.

For Money Lent.

1. The plaintiff complains of the defendant for that he is indebted to plaintiff in the sum of \$..... for so much money loaned on the day of, 18..., by plaintiff to defendant at his request, which sum said defendant agreed to pay on the day of, 18...

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 93.

For Money Had and Received.

1. The plaintiff complains of the defendant for that he is indebted to plaintiff in the sum of \$....., for so much money received from E. F., on the day of, 18..., to and for the use of said plaintiff, which sum was then due and payable.

2. Said defendant has not paid the same nor any part thereof, and there is due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 94.

For Money Paid Out and Expended.

1. The plaintiff complains of the defendant for that on the day of, 18..., he paid to one, E. F., to and for the use of said defendant, and at his request, the sum of \$....., which sum the defendant agreed to pay to plaintiff.

2. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 95.

To Recover Interest.

1. The plaintiff complains of the defendant for that he is indebted to the plaintiff in the sum of \$....., for the [*first*] installment of interest now due on a certain promissory note, executed and delivered by the defendant to the plaintiff on the day of, 18..., for the sum of \$....., with interest at ... per cent, payable annually.

2. No part of said interest has been paid, and there is now due thereon from the defendant to plaintiff the sum of \$..... A copy of said note is hereto attached.

No. 96.

For Use and Occupation.

1. The plaintiff complains of the defendant for that he, with plaintiff's permission, and as his tenant, used and occupied [*describe premises*] belonging to plaintiff, for months, commencing on the day of, 18..., the rental value of said premises being the sum of \$..... per month.

2. No part of said rent has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of....., 18...¹

No. 97.

Lessor v. Lessee.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, by an oral agreement, leased to the defendant for the period of one year from that date the following described premises, viz.: [*lot 2, in block ..., in the city of Omaha, Nebraska, with the buildings and appurtenances thereon*], for which the defendant agreed to pay plaintiff, as rent for the same, the sum of \$..... per annum.

2. The defendant entered upon and retained possession of said premises under said lease, but has failed to pay the rent.

3. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of....., 18...

No. 98.

For Money Due on a Sale of Real Estate.

1. The plaintiff complains of the defendant for that he is indebted to the plaintiff for the following described real estate, to-wit: [*the N. E. quarter of section two, in township 12 N., of R. 14 E. of 6 P. M.*], sold and conveyed by plaintiff to the defendant on the day of....., 18..., for which he agreed to pay to plaintiff the sum of \$....., at that date.

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 99.

For Fixtures.

1. The plaintiff complains of the defendant for that he is indebted to the plaintiff for the following fixtures erected by

¹ To authorize a recovery in this form of action the defendant must occupy as *tenant*. If he hold *adversely* the action cannot be maintained.

² At common law it was unnecessary to describe the premises, but under the code the premises should be described, otherwise the petition will be subject to a motion to make definite and certain.

plaintiff on [*describe fixtures*], which plaintiff sold and delivered up to the defendant at his request, and for which defendant agreed to pay plaintiff the sum of \$.....

2. No part of the same has been paid, and there is now due the plaintiff from the defendant thereon the sum of \$....., with interest from the day of, 18...

No. 100.

For Hire of Horses, etc.¹

1. The plaintiff complains of the defendant for that he is indebted to plaintiff for the use and hire of ... horses belonging to plaintiff, which were let and hired to the defendant at his request, from the day of, 18..., to the day of, 18..., for which he agreed to pay to plaintiff the sum of \$.....

2. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 101.

On an Account Stated.

1. The plaintiff complains of the defendant for that an account was stated between the plaintiff and defendant on the day of, 18..., upon which there was found to be due from the defendant to the plaintiff the sum of \$....., which sum the defendant agreed to pay to plaintiff.

2. No part thereof has been paid, and there is due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 102.

To Correct an Account Stated and for Judgment on the Account as Corrected.

1. [*As in No. 101.*]

2. Since the statement of said account the plaintiff has discovered the following errors therein, of which he was wholly ignorant at the time of said settlement, viz.: [*\$..... loaned by plaintiff to defendant on or about the day of, 18...*], which by mistake was wholly omitted from said account.

¹ If several distinct charges are made state the action in the form of an account.

3. On the day of....., 18..., the plaintiff discovered said mistake, and immediately thereafter requested defendant to correct the same, and to re-state said account, which he refused to do.

4. Said account should be corrected as above set forth, and the balance thereon in favor of the plaintiff should be the sum of \$....., instead of the sum of \$....., as in said stated account.

5. The plaintiff therefore prays that the errors and mistakes above set forth in stating said account may be corrected, and that he may have judgment against the defendant upon said account as corrected for the sum of \$....., with interest from the day of, 18...

No. 103.

By Assignee of Lender v. Borrower.

1. The plaintiff complains of the defendant for that one, E. F., on the day of, 18..., loaned to the defendant at his request the sum of \$....., which he agreed to repay to said E. F. on or before the of, 18...

2. On the day of, 18..., said debt was duly assigned to the plaintiff, of which the defendant was then duly notified.

3. No part of the same has been paid, and there is due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18....

No. 104.

Maker v. Payee of Accommodation Note.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff executed and delivered to the defendant a promissory note, of which the following is a copy.

[Copy note.]

2. On the day of, 18..., said defendant indorsed and delivered said note to, who on the maturity thereof brought suit thereon and recovered the amount thereof against the plaintiff, which he was compelled to pay.

3. Plaintiff alleges that he was a mere surety on said note,

and received no consideration for the same, and that [*the payee*] is the principal debtor therein.

4. No part thereof has been paid to plaintiff, and there is due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 105.

To Recover Price of Personal Property.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff sold and delivered to the defendant at his request [*one yoke of oxen*], for which he agreed to pay plaintiff on or before the day of, 18..., the sum of \$.....

2. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 106.

Implied Agreement to Pay Value.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff sold and delivered to the defendant at his request [*one two-horse lumber wagon*], for which the defendant agreed to pay the fair value thereof.

2. The fair market value of said wagon was the sum of \$.....

3. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 107.

For Refusing to Receive and Pay for Goods Purchased.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant purchased from the plaintiff the following goods: [*describe them*], for an agreed price of \$..... [*If the price is \$50, or exceeds that sum, the plaintiff must allege either that the contract is in writing and signed by the defendant, or that defendant has accepted a portion of the goods, or paid a portion of the purchase money. G. S., 393.*]

2. The plaintiff has duly performed all the conditions of said

contract on his part to be performed, and has tendered said goods to the defendant, and demanded payment of the same, which was refused.

3. Said goods are ready to be delivered to defendant. There is due from the defendant to the plaintiff thereon the sum of \$.....

No. 108.

Property Purchased on Condition.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff sold to the defendant at his request [*one yoke of oxen*], for the sum of \$....., upon condition that said defendant should take said oxen on trial, to be returned to plaintiff by 6 o'clock P.M. on the day of, 18..., or the defendant to pay plaintiff said sum of \$.....

2. In pursuance of said agreement defendant obtained possession of said oxen from plaintiff, but did not return, nor offer to return, the same at the time specified.

3. He has not paid said sum nor any part thereof, and there is now due from the defendant to plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 109.

For Contribution.

1. The plaintiff complains of the defendant for that on the day of, 18..., one,, with the plaintiff and defendant as sureties, made and delivered to a promissory note, of which the following is a copy:

[*Copy note.*]

2. At the maturity of said note the principal debtor thereon had become insolvent, and the plaintiff, as one of the sureties, was compelled to pay the whole amount of said note, amounting to the sum of \$.....

3. On the day of, 18..., the plaintiff requested the defendant to pay him the sum of \$....., as his contributive share of said note, which he refused to pay.

4. The defendant is indebted to plaintiff in the sum of \$....., as his contributive share thereof.

5. No part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 110.

Building Contract.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff and defendant entered into the following agreement:

[*Copy agreement.*]

2. The plaintiff duly performed all the conditions of said agreement on his part to be performed.

3. The defendant has not performed said contract in this: [*state in what the failure or defect consists.*] [*If objection is made to the residue of the work, say*] The residue of the work was performed in so unskillful and unworkmanlike a manner as to be of no value, to the plaintiff's damage in the sum of \$.....

No. 111.

By Contractor on Modified Contract, with Charge for Extra Work.

1. [*As in preceding form.*]

2. On the day of, 18..., at the defendant's request, said contract was modified in the following particulars, viz.: [*state modifications*], for which the defendant promised to pay the plaintiff the reasonable value in addition to the sum stated in the contract.

3. The plaintiff has duly performed all the conditions of said contract as modified on his part to be performed.

4. The reasonable value of the extra work done by plaintiff in addition to the price fixed in said contract is the sum of \$....., making an aggregate of \$.....

Second cause of action. 1. Between the day of, 18..., and the day of, 18..., the plaintiff furnished materials and performed other labor for the defendant, at his request, as follows: [*give itemized statement of labor performed and materials furnished*], for which the defendant promised to pay plaintiff a reasonable price.

2. A reasonable price for the same is the sum of \$....., which is now due, etc.

5. No part thereof has been paid, and there is now due from

the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 112.

Against Contractor for not Completing, with Damages for Loss of Rent.

1. [As in form 111.]
2. The plaintiff has duly performed all the conditions of said contract on his part to be performed.
3. The defendant inclosed said building, but has neglected to finish the same, although the time for the completion of said building expired on the day of, 18...
4. On the day of, 18..., the plaintiff leased said building to for the term of years, at a yearly rent of \$....., of which the defendant was duly notified.
5. The plaintiff has been unable to give said possession of said building by reason of the defendant's failure to perform his contract, and has thereby lost the benefits of said lease, to his damage in the sum of \$....., no part of which has been paid.

No. 113.

Purchaser v. Seller.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant sold to plaintiff the following property, to-wit: [one hundred head of fat three-year-old steers], for the sum of \$....., the plaintiff paying the defendant thereon, at the time he purchased the same, the sum of \$....., the balance to be paid on the delivery of said cattle to plaintiff on the day of, 18...
2. The plaintiff has duly performed all the conditions of said agreement on his part to be performed, and has at all times been ready to accept said cattle and pay the balance due thereon.
3. The defendant has wholly neglected and refused to deliver the same to plaintiff, and to comply with the conditions of said contract, to the damage of the plaintiff in the sum of \$.....

No. 114.

Seller v. Purchaser.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff sold to defendant the fol-

lowing property, to-wit: [*describe it*], for the sum of \$....., the defendant paying plaintiff, at the time he purchased the same, the sum of \$....., the balance to be paid on the delivery of said property.

2. The defendant refused to receive said property or to pay the balance due thereon, although the plaintiff has duly performed all the conditions of said contract on his part to be performed, and has offered and is at all times ready to deliver said property to defendant whenever he will receive the same.

3. The plaintiff has sustained damages in the premises in the sum of \$....., no part of which has been paid.

No. 115.

For Deficiency on a Re-sale.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff offered at public sale, at the in county, the following described property, viz.: [*describe it*], sold under an execution issued on a judgment in favor of and against, and that said defendant purchased said property at said sale for the sum of \$.....

2. On the day of, 18..., the plaintiff tendered said property to defendant and demanded payment therefor, but the defendant refused to receive said property or to pay for the same or any part thereof, although plaintiff was at all times ready to deliver the same to the defendant.

3. On the day of, 18..., the plaintiff, after due notice to the defendant of the time and place of re-sale, re-sold said property at public auction for the sum of \$.....

4. The expenses of such re-sale amount to the sum of \$....., and the deficiency on such re-sale is the sum of \$..... No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 116.

By Manufacturer for Goods Manufactured to Order but not Accepted.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at the defendant's request, manufactured for him, for which the defendant

¹ See 2 Kent Com., 504. *J. nes v. Null*, 9 Neb., 254.

agreed to pay plaintiff the sum of \$..... upon delivery thereof.

2. On the day of, 18..., the plaintiff offered to deliver said goods to defendant, and is ready at all times to deliver the same, and has duly performed all the conditions of said contract on his part, but said defendant refused and still refuses to receive said goods or to pay for the same. There is now due from the defendant thereon the sum of \$.....

No. 117.

By Purchaser of Good-will against Seller for Breach of Contract.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was, and for a long time prior thereto had been, engaged in the business of, in the town of, in county, and on said day said defendant, in consideration that the plaintiff would purchase said and the good-will of said business for the sum of \$....., said defendant agreed with the plaintiff that he would not, by himself or another, set up or carry on the business of in said town.

2. Relying upon said promises of the defendant, the plaintiff purchased said and the good-will of said business for said sum of \$.....

3. The plaintiff has duly performed all the conditions of said contract on his part to be performed.

4. On the day of, 18..., said defendant set up and has since carried on the business of in said town of, to the damage of plaintiff in the sum of \$.....

INSURANCE.¹

No. 118.

On River Policy.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was the owner of the steamboat Belle, then lying at the port of Omaha, and the insurance company, duly incorporated under the laws of the state of, with power to insure against perils of navigation, in consideration of a premium therefor paid to them by

¹ 2 Greenleaf Ev., § 376, note 1.

the plaintiff on said day, made and delivered to plaintiff a policy of insurance upon said steamboat for a voyage or trip down the Missouri river to the city of Atchison, in the state of Kansas, and at and from said city of Atchison to the port of Omaha, and thereby promised to insure, and did insure, for said plaintiff \$..... upon said steamboat for said voyage or trip against the perils of said river. A copy of said policy is hereto attached.

2. The plaintiff avers that said steamboat did, on the day of, 18..., depart on the voyage described in said policy, and while proceeding therein, and while said policy was in full force, was by the perils of the said river wrecked and totally lost.

3. Said steamboat was, at the time said loss occurred, of the value of \$.....

4. On the day of, 18..., plaintiff furnished the defendant with proof of loss and his interest in said boat, and has duly performed all the conditions of said policy on his part to be performed.

5. Said defendant has not paid said loss, nor any part thereof, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

In case the insurance is upon the cargo against the perils of navigation, the petition can readily be changed.

No recovery can be had until the *proof* is made. *McCann v. Aetna Insurance Co.*, 3 Neb., 198. If no objection is made by the company to the *form* of the proof of loss, it will be waived. *Lippold v. Insurance Co.*, Id., 391.

No. 119.

Loss of Cargo by Fire.

1. The plaintiff complains of the defendant for that on the day of, 18..., the steamboat Belle was lying at the port of Omaha, and the plaintiff was the owner of the cargo [*or certain goods*] then laden on board said vessel, and the defendant, in consideration of a certain premium paid to it by the plaintiff at that time, made and delivered to plaintiff a certain policy of insurance against fire upon said cargo, as follows:

[*Copy policy.*]

2. On the day of, 18..., said steamboat departed from the port of Omaha on the voyage described in said policy, and during said voyage, while said vessel with the cargo on board was lying [*state the facts*] at the port of, said cargo was wholly destroyed by fire.

3. The property of plaintiff so burned was of the value of \$.....

4. On the day of, 18..., the plaintiff furnished the defendant with proof of loss and of his interest, and has duly performed all the conditions of said policy on his part to be performed.

5. Said defendant has not paid said loss nor any part thereof, and there is now due to the plaintiff from the defendant thereon the sum of \$....., and interest from the of, 18...

NO. 120.

Loss of Buildings by Fire.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was the owner of [*describe premises and title thereto, as in policy*], and said defendant on said day, in consideration of the sum of \$....., paid by the plaintiff to the defendant as a premium, executed and delivered to the plaintiff the following policy of insurance.

[*Copy policy.*]

2. The plaintiff further alleges that on the day of, 18..., said was burned and wholly destroyed by fire [*if the loss was only partial so state*]; that said fire did not originate by any act, design, or procurement on the part of plaintiff [*negative the causes excepted in the policy*].

3. On the day of, 18..., the plaintiff gave said defendant due notice and proof of said fire and loss, and has duly performed on his part all the conditions of said policy of insurance.

4. Said building was worth \$..... when destroyed, and on the day of, 18..., the plaintiff demanded of said defendant the payment of said insurance.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff on said policy the sum of \$....., with interest from the day of, 18...

No. 121.

On Renewal of Policy.

1. [*As in preceding form.*]

2. The defendant, on the day of, 18..., in consideration of the sum of \$....., paid by the plaintiff to the defendant as a premium, executed and delivered to the plaintiff a renewal of said policy in the words and figures following, to-wit:

[*Copy renewal.*]

[*Continue as in 2, 3, 4, and 5 in preceding form.*]

No. 122.

On Fire Insurance Policy where the Plaintiff Purchased the Property after the Insurance.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the defendant was and still is a corporation duly organized under the laws of the state of, with power to insure property against loss or destruction by fire.

2. On the day of, 18..., one A. B. was the owner of [*or had an interest in*] the store building known as, situate on lot in block in the city of, and paid to the defendant the sum of \$....., for which the defendant delivered to said A. B. a policy of insurance on said store building. The following is a copy of said policy. [*Copy Policy.*]

3. On the day of, 18..., said A. B., with the consent of the defendant in writing indorsed on said policy, sold and conveyed to the plaintiff his right, title, and interest in said store building, and in his policy of insurance thereon.

4. Said A. B., at the time of taking out said policy of insurance, and from that time until the sale and conveyance of said property to the plaintiff, was the owner of the same.

5. While said policy was in full force, to-wit, on the day of, 18..., said store building was entirely destroyed by fire.

6. The plaintiff thereby sustained loss in the sum of \$.....

7. On the day of, 18..., the plaintiff furnished to the defendant proof of his loss and interest in said building, and has duly performed all the conditions of said policy on his part to be performed.

8. No part of said loss has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 123.

On an Agreement to Insure where Policy never Issued.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the defendant was and still is a corporation duly organized under the laws of the state of, with power to insure property against loss or destruction by fire..

2. On the day of, 18..., the plaintiff was the owner of the dwelling-house situate on lot, in block, in the city of, and on said day applied to, the agent of the defendant, and lawfully authorized to make the contract hereinafter set forth, for insurance against loss or damage by fire upon said dwelling-house. And on the day aforesaid said defendant, by its agent, in consideration of the sum of \$....., then duly paid by plaintiff, agreed to become an insurer of said property for the sum of \$..... for years from that time, and agreed to make and deliver to plaintiff a policy of insurance for \$....., in the usual form of such policies issued by the defendant.

3. It was expressly agreed by and between the plaintiff and defendant at the time of making said contract that said insurance should commence and be binding on the defendant from the time of the receipt of said premium, and the defendant, in consideration of said premium, agreed to make and deliver to plaintiff within a reasonable time its policy of insurance upon said dwelling-house, to the amount of \$....., against loss and damage by fire for the period aforesaid.

4. By the terms of the policies of insurance issued by the defendant in the usual form, said defendant promises [*state the substance of the proposed policy, and state when the loss is payable*].

5. On the day of, 18..., while said agreement to insure was in full force, said dwelling-house was entirely destroyed by fire.

6. The value of said building at the time said fire occurred was the sum of \$.....

7. On the day of, 18..., the plaintiff furnished to the defendant proof of his loss and interest in said building, and duly performed all the conditions of said agreement on his part to be performed.

8. No part of said loss has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....¹

No. 124.

By Assignee of Agreement to Insure where no Policy is Issued.

From 1 to 7 inclusive. [*As in preceding form, substituting the name of the person insuring for "plaintiff."*]

8. On the day of, 18..., said A. B., for a valuable consideration, assigned said contract and insurance, and all rights pertaining to the same, to the plaintiff, of which the defendant was then duly notified.

[*Continue as in preceding form.*]

No. 125.

To Reform a Policy of Insurance, and for Judgment for a Loss under the Same.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the defendant was and still is a corporation duly organized under the laws of the State of, with lawful authority to make contracts of insurance against fire.

2. On the day of, 18..., the plaintiff was the owner of a dwelling-house situated on lot No. ..., in block ..., in the city of, in which was a large amount of furniture belonging to plaintiff of the value of \$.....

3. On said day the defendant, in consideration of \$..... to it then paid, made and delivered to the plaintiff a policy of insurance on said house and furniture for the period of years, in which policy the insurance on said house is stated to be for the amount of \$....., and on said furniture for the sum of \$.....

4. The amount of insurance agreed upon by the plaintiff and defendant at the time of the payment of the consideration, was the sum of \$..... upon the house, and \$..... upon the furniture, but these amounts, by mistake of the agent who filled up the policy, were transposed.

5. On the day of, 18..., said house was wholly destroyed by fire, but said furniture was saved without material loss.

6. At the time said policy was delivered to plaintiff he sup-

¹ See *Rockwell v. Hartford Fire Ins. Co.*, 4 Abb. Pr., 179.

posed it had been drawn up according to the agreement, and did not read the same, and did not know of the mistake therein until after said fire.

7. Said house was of the value of \$.....

8. On the day of, 18..., the plaintiff furnished defendant with proof of loss by said fire, and has in all things duly performed all the conditions of said policy on his part to be performed.

9. No part of said loss has been paid.

10. The plaintiff therefore prays that said policy may be reformed by inserting therein \$..... insurance on said house, and \$..... on said furniture, and for judgment against the defendant for the sum of \$....., and costs of suit.

NO. 126.

By Wife on Policy of Life Insurance.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the defendant was and now is a corporation duly organized under the laws of the State of, with lawful authority to issue policies of life insurance.

2. On the day of, 18..., the plaintiff paid to the defendant the sum of \$....., as a premium for a policy of insurance upon the life of one G. H., in consideration whereof the defendant executed and delivered to the plaintiff a policy of life insurance upon the life of said G. H., and thereby insured his life in the sum of \$..... The following is a copy of said policy:¹

[*Copy policy.*]

3. The plaintiff was then the wife of said G. H., and as such had a valuable interest in his life.

4. The plaintiff further alleges that on the day of, 18..., said G. H. died, his death not being caused by [*negative excepted cases in policy*].

¹ In an action on a policy of insurance, a building contract, an agreement for the sale of property and the payment of the purchase money, and cases of like character, "the stipulations on both sides being mutual and dependant, must be stated substantially in the words of the instrument, and a copy of the agreement may therefore be set forth in the pleading as a substitute for its recital. Swan's Pleading and Precedents, 199.

5. All premiums becoming due upon said policy up to the time of the decease of said G. H. had been fully paid, and all of the conditions of said policy to be performed and fulfilled by said G. H. or plaintiff have been duly performed and complied with.

6. On the day of, 18..., the plaintiff duly notified said defendant of the death of said G. H., and made proof thereof, and demanded payment of the amount due on said policy.

7. No part of the same has been paid, and there is now due thereon from the defendant to the plaintiff the sum of \$....., with interest from the day of, 18...

No. 127.

By Executor.

1. [*As in preceding form.*]

2. On the day of, 18..., said defendant, in consideration of receiving from one A. B., late of, now deceased, the sum of \$..... as a premium, and the further sum of \$....., to be by him paid annually during his life, made and delivered to said A. B. its policy of life insurance in writing on his life. The following is a copy of said policy:

[*Copy policy.*]

3. On the day of, 18..., said A. B. died, his death not being caused by [*any cause excepted in policy*].

4. Said A. B. left a will in which the plaintiff was appointed sole executor, which will was duly admitted to probate on the day of, 18..., in the county court of county, and letters testamentary therefrom duly issued to the plaintiff, who is now the executor under said will.

5. The said A. B. and the plaintiff each duly performed all the conditions of said policy of insurance on their part.

6. On the day of, 18..., the plaintiff made proof of the death of in conformity with the requirements of said policy.

7. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 128.

By Partner or Creditor on Life Policy.¹

1. [As in 126.]

2. On the day of, 18..., said defendant, in consideration of receiving from the plaintiff the sum of \$....., and of an annual premium of the sum of \$..... to be paid by plaintiff during the life of said A. B., made and delivered to the plaintiff its policy of life insurance in writing on the life of said A. B. The following is a copy of said policy:

[Copy policy.]

3. The plaintiff at the time aforesaid, and at the time of his death was a creditor of said A. B. to the amount of \$....., and as such creditor had an interest in his life.

4. On the day of, 18..., said A. B. died, his death not being caused by [any cause excepted in policy].

5. The plaintiff duly performed all the conditions of said policy on his part to be performed.

6. On the day of, 18..., the plaintiff made proof of the death of said in conformity with the requirements of said policy.

7. No part of said insurance has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 129.

Accident and Life Insurance.

1. [As in 126.]

2. On the day of, 18..., said defendant, in consideration of the sum of \$....., made and delivered to plaintiff its policy of insurance in writing on the life of A. B. The following is a copy of said policy:

[Copy policy.]

3. On or about the day of, 18..., and while said policy was in full force, said A. B. received a personal injury, from which, on or about the day of, he died, said injury being caused by [describe manner of inflicting], and being an accident insured against by said policy of insurance [continue as in 3, 5, 6, and 7 in preceding form.]

¹ See 2 Greenleaf Ev., Sec. 409.

No. 130.

Warranty of Soundness.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, as an inducement to plaintiff to purchase from him a certain horse for the sum of \$....., warranted the same to be [*state the warranty according to the fact*], and plaintiff, relying upon said warranty, purchased said horse from the defendant for the sum of \$....., then duly paid.

2. Plaintiff avers that said horse at the time of said sale was unsound in this [*state wherein it was unsound*], and was of no value whatever. [*If of any value state the same according to the fact.*]

3. The plaintiff has incurred necessary expenses in attempting to cure said horse amounting to the sum of \$.....

4. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 131.

Implied Warranty of Title.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant sold and delivered to the plaintiff [*describe property*] for the sum of \$....., then duly paid, it being a part of the conditions and consideration of said contract that defendant was the owner of said goods, and could transfer the title to the same by a sale.

2. Plaintiff avers that one, G. H., was the owner of said goods at the time of said sale, and afterwards recovered possession of the same by replevin, and said goods were wholly lost to plaintiff, the defendant at the time of said sale having no right or authority whatever to sell the same.

3. The plaintiff has sustained damages in the sum of \$.....

No. 132.

On Warranty to Pack Meat for a Particular Market.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, agreed to purchase from him [*one hundred boxes of bacon*], each containing pounds, at ... cents per pound, amounting in the aggregate to the sum of \$.....

¹ As to what constitutes a warranty of personal property, see *Little v. Woodworth*, 8 Neb., 279. *Patrick v. Leach*, 8 Id., 530.

2. In consideration of the premises the defendant then promised the plaintiff to furnish said bacon, properly preserved and packed for the Irish market, and to pack it properly for a voyage to said market.

3. Relying upon said promises of the defendant, the plaintiff purchased the same for the price and upon the terms and conditions aforesaid, and the defendant furnished under said agreement one hundred boxes of bacon, weighing in the aggregate pounds, which was shipped to the Irish market, but was so negligently and improperly preserved and packed that by reason thereof the same was, without any fault of plaintiff, damaged and spoiled, and of no value whatever.

4. The plaintiff paid for shipping the same the sum of \$....., and lost the profits thereon, amounting to the sum of \$.....

5. The plaintiff has sustained damages in the sum of \$.....

No. 133.

Warranty of the Amount Due on a Judgment Assigned to Plaintiff.

1. The plaintiff complains of the defendant for that said defendant, on the day of, 18..., for a valuable consideration assigned to plaintiff a judgment recovered by said defendant in the court of county, for the sum of \$....., on the day of, 18..., in an action wherein the defendant herein was plaintiff and C. D. defendant.

2. As an inducement for plaintiff to purchase said judgment said defendant did then and there warrant that there was due thereon from said C. D. the sum of \$....., and plaintiff, relying upon said warranty, did then and there purchase the same.

3. At the time of the assignment of said judgment to plaintiff it had been paid in full to the defendant, and no part thereof has been paid to plaintiff.

4. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 134.

*Warranty Deed*¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, in consideration of the

¹ No action can be maintained on the warranty until eviction. See *Scott v. Twiss*, 4 Neb., 133. *Backus v. McCoy*, 3 Ohio, 221.

sum of \$..... then paid, delivered to plaintiff a warranty deed duly executed, and thereby sold and conveyed to plaintiff the following described lands, viz.: [*describe land*].

2. By said deed defendant covenanted as follows:

[*Copy covenant.*]

3. At the date of the execution and delivery of said deed said defendant did not have a good and sufficient title to said premises, but on the contrary the paramount right and title to the same was in one,, who has ousted and dispossessed the plaintiff therefrom by due course of law.

4. The plaintiff paid the sum of \$..... for necessary costs and expenses in defending said action. The plaintiff has sustained damages by reason of the premises in the sum of \$.....

No. 135.

*By Assignee of Grantee v. Grantor.*¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, in consideration of the sum of \$..... then paid, delivered to one E. F. a warranty deed of that date, duly executed, and thereby sold and conveyed to said E. F. the following described lands: [*describe lands*].

2. By said deed defendant covenanted as follows:

[*Copy covenant.*]

3. Said E. F. entered into possession of said premises under said deed, and on or about the day of, 18..., for a valuable consideration, conveyed the same, by deed duly executed, to one G. H., who entered into possession thereof, and on the day of, 18..., conveyed said premises by deed duly executed to plaintiff, who by virtue of said conveyance entered into possession thereof, but was ousted and dispossessed of said premises by due course of law, said defendant not having a good and sufficient title to said premises at the time he executed and delivered said deed to E. F.

4. The plaintiff has sustained damages in the sum of \$.....

¹ It seems to be necessary to allege that the several purchasers entered into *possession*, because if the possession is broken the covenant would cease to run with the land. See *Scott v. Twiss*, 4 Neb., 238, and cases cited.

No. 136.

Covenant Against Incumbrances.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, in consideration of the sum of \$....., delivered to plaintiff a warranty deed of that date, duly executed, and thereby sold and conveyed to plaintiff the following described lands: [*describe lands*].

2. By said deed defendant covenanted as follows:

[*Copy covenant.*]

3. Said premises were not free from incumbrances at the time of the execution and delivery of said deed, but [*state what incumbrances, and the amount required to be paid to remove the same*]; the plaintiff was compelled to remove said incumbrances, and paid² the sum of \$..... to discharge the same, of all which the defendant was duly notified.

4. No part thereof has been paid. The plaintiff has sustained damages in the sum of \$....., with interest from the day of, 18...

No. 137.

Devisee of Grantee v. Grantor.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, in consideration of the sum of \$....., delivered to E. F. a deed of that date, duly executed, and thereby sold and conveyed to said E. F. the following described lands: [*describe them*].

2. Said E. F. entered into possession of said premises under said deed, and on or about the day of, 18..., made his last will and testament in writing, properly signed and attested, and thereby devised said premises to plaintiff [*and.....*], and afterwards, without changing said will as to said devisee, on or about the day of, 18..., died, he at that time having his domicile in county,

¹ An incumbrance by way of taxes must be first paid off before a vendee can plead the same as a set-off. *Mills v. Saunders*, 4 Neb., 190. A covenant against incumbrances does not run with the land. *Chapman v. Kimball*, 7 Neb., 396.

² An action for *breach* of the contract will lie whether the incumbrance is paid or not, in such only nominal damages can be recovered. *Nesbitt v. Campbell*, 5 Neb., 432.

3. Said will was thereafter duly admitted to probate in the county court of county, [*Nebraska*], and a certificate of such proof was indorsed thereon, signed by the county judge and attested by his seal,¹ and an attested copy thereof recorded in the registry of deeds in county.

4. The plaintiff thereupon entered into possession of said premises under said will, but was ousted and dispossessed thereof by due course of law, said defendant not having a good and sufficient title to said premises at the time he executed and delivered said deed to said E. F.

5. The plaintiff has sustained damages by reason of the premises in the sum of \$.....

No. 138.

Heirs v. Grantor.

1. [*As in preceding form.*]

2. Said E. F., entered into possession of said premises under said deed, and while in possession of the same, on or about the day of, 18..., died; thereupon all the estate of said E. F., including said premises, descended to the plaintiffs, who are his children, who on the same day entered into the possession of said premises, but were thereafter ousted and dispossessed of the same by due course of law, said defendant not having a good and sufficient title to said premises at the time he executed said deed to E. F.

3. The plaintiffs have sustained damages in the premises in the sum of

No. 139.

Guaranty of Payment of Goods Supplied to Another.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant executed and delivered to plaintiff his special promise in writing to answer for the debt of one C. D. The following is a copy of said promise:

[*Copy guaranty.*]

2. The plaintiff alleges that, in consideration of said guaranty and relying upon the same, he afterwards, and on or before

¹ G. S., 306, § 160.

the day of, 18..., sold and delivered the following goods to said C. D. on credit [*copy bill of goods*] for the sum set opposite each article in said bill, amounting in the aggregate to the sum of \$.....

3. The credit and time of payment of said goods by the said C. D. to the plaintiff have expired, and on the day of, 18..., he was requested by plaintiff to pay the amount due for the same.

4. Said C. D. has not paid the same nor any part thereof, of all which the defendant had due notice on the day of, 18..., and was then requested by plaintiff to pay the same.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 140.

Guaranty for Payment of Rent.

1. The plaintiff complains of the defendant for that on the day of, 18..., one A. B. leased from the plaintiff the following described premises, viz.: [*describe premises*], at a yearly rent of \$....., payable [*designate time*].

2. At the time of making said lease the defendant, in consideration of leasing said premises to said A. B., and as security for the payment of the rent thereof, made and delivered to plaintiff an agreement in writing, of which the following is a copy:

[*Copy guaranty.*]

3. Said A. B. entered into possession of said premises under said lease on the day of, 18..., and occupied the same until the day of, 18...

4. The said A. B. has failed to pay the rent due thereon from the day of, 18..., to the day of, 18..., amounting to the sum of \$....., and on the day of, 18..., the plaintiff demanded payment thereof from him, but he did not pay the same, of which the defendant was then duly notified.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff on said guaranty the sum of \$.....

No. 141.

Against Principal and Sureties for Failure to Pay for Services Rendered on Contract.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff and one C. D. entered into a contract in writing, a copy of which is hereto attached, marked "Ex. A.," and made part of this petition.

2. At the time of making said agreement, and in consideration thereof, the defendants, C. D., E. F., and G. H., made and delivered to plaintiff an agreement in writing, of which the following is a copy:

[*Copy guaranty.*]

3. The plaintiff has duly performed all the conditions of said contracts on his part to be performed, and on the day of, 18..., there was then due him on the contract mentioned in said guaranty the sum of \$.....

4. The defendants have not performed said contract on their part, but have wholly neglected and refused to perform the same, or to pay the amount due thereon.

5. No part thereof has been paid, and there is now due from the defendants to the plaintiff thereon the sum of \$.....

No. 142.

Guaranty of Precedent Debt.

1. The plaintiff complains of the defendant for that on the day of, 18..., one C. D. was indebted to the plaintiff in the sum of \$....., then due and payable.

2. On said day the defendant, in consideration of an extension of the time of payment of the same by plaintiff, from the day of, 18..., to the day of, 18..., made and delivered to the plaintiff an agreement in writing, of which the following is a copy:

[*Copy guaranty.*]

3. The plaintiff duly performed all the conditions of said agreement on his part to be performed.

4. No part of said debt has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 143.

On Promise to Pay the Debt of Another in Consideration of Creditor Releasing Lien.

1. The plaintiff complains of the defendant for that on the day of, 18..., one C. D. was indebted to the plaintiff in the sum of \$....., then due and payable, which debt was secured by a lien upon certain goods of C. D., then in possession of plaintiff.

2. On said day the defendant requested the plaintiff to surrender said goods to said C. D., and abandon his lien thereon, in consideration whereof the defendant promised to pay plaintiff the amount of said debt on the day of, 18....

3. In consideration of said promise of defendant the plaintiff then and there gave up the possession of said goods to said C. D., and abandoned his lien thereon.

4. No part of said debt has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 144.

Against Guarantor of Mortgage to Recover Deficiency After Foreclosure.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant entered into an agreement in writing with the plaintiff, of which the following is a copy:

[*Copy agreement.*]

2. Default was made in the payment of the principal and interest of said note and mortgage when the same became due, and thereupon an action was commenced in the district court of county to foreclose the same, and for a sale of the mortgaged premises, and on the day of, 18..., a decree of foreclosure and sale was duly rendered in said court, the amount of the decree being the sum of \$.....

3. On the day of, 18..., said premises were sold under said decree for the sum of \$....., and said sale was thereupon duly reported to the court and confirmed, and a deed made to the purchaser.

4. On the day of, 18..., said court directed the payment, by the mortgagor, of the sum of \$....., being the balance of said mortgage debt, and ordered said execution to issue therefor.

5. An execution was issued on said day against the mortgagor for the collection of said deficiency, which was returned wholly unsatisfied, and said mortgagor is insolvent.

6. On the day of, 18..., the plaintiff demanded of the defendant the payment of said sum, which he refused to pay.

7. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 145.

Lessor v. Lessee for Non-repairs.

1. The plaintiff complains of the defendant for that on the day of, 18..., by a certain lease then duly made between the plaintiff and defendant, the plaintiff demised to the defendant [*describe the premises*], for ... years from said date.

2. By the terms of said lease, said defendant covenanted that he would [*copy covenant*].

3. Defendant thereupon entered upon said premises under said lease, and continued to occupy the same during said term, but did not [*negative the covenant and state specifically wherein the defendant has failed to make repairs*], whereby the premises were depreciated in value in the sum of \$.....

4. The plaintiff has thereby sustained damages in the sum of \$.....

No. 146.

Lessee v. Lessor for Non-repairs.

1. [*As in preceding form, transposing the words "defendant" and "plaintiff" where necessary.*]

2. [*As in preceding form.*]

3. Plaintiff thereupon entered upon said premises under said lease, but said defendant [*negative the covenant and state specifically what repairs the defendant neglected or refused to make*].

4. On the day of, 18..., the plaintiff requested the defendant to perform said covenant on his part to be performed, and make suitable and necessary repairs upon said premises, as by said covenant he was required to do, but said defendant refused [*or neglected so to do within a reasonable time after said request*], and thereupon plaintiff, on and between the day of

....., 18..., and the day of, 18..., made said repairs, and expended therein the sum of \$.....

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18....¹

No. 147.

Assignee of Lessor Holding Under a Lease v. Lessee.

1. The plaintiff complains of the defendant for that on the day of, 18..., one A. B., being lawfully possessed of the following described premises, viz.: [*describe premises*], for the residue of a term of ... years, commencing on the day of, 18..., and to continue until the day of, 18..., by a certain lease then duly made between said A. B. and the defendant, said A. B. demised to the defendant the above described premises, for the term of ... years from that date.

2. That by the terms of said lease said defendant covenanted that he would [*copy covenant*].

3. Defendant thereupon entered upon said premises under said lease, and has continued to occupy the same until the present time [*or continued to occupy the same during said term*], but did not [*negative the covenant, and state at what particular time the covenant was broken, so that it will appear that it was after the assignment*].

4. On the day of, 18..., said A. B., by his deed duly executed and delivered, and in consideration of the sum of \$....., sold and assigned said reversion and all interest in said lease and premises to plaintiff.

5. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 148.

Assignee of Lessor v. Assignee of Lessee on Covenant to Insure.

1. The plaintiff complains of the defendant for that on the day of, 18..., by a certain lease then duly made between and, said demised to the following described premises, to-wit: [*describe premises*], for a term of years from said date.

¹ See *Hexter v. Knox*, 63 N. Y., 561. Taylor's L. & T., § 330.

2. That by one of the covenants in said lease, the said lessee was to keep said premises insured in the sum of \$....., for the benefit of the lessor, and that if at any time said lessee should fail to keep the same so insured, said lessor might cause an insurance to be made thereon at the expense of said lessee, for the benefit of said lessor.

3. On the day of, 18..., [*the lessor*] sold and assigned to the plaintiff all his interest in said lease, and on or about said date, all the interest of [*the lessee*] in said premises and lease was sold under an order of court to satisfy judgments against said [*lessee*] and the defendants became the purchasers at said sale of the interest of said lessee in said premises.

4. Defendants thereupon took possession of said premises under said sale, while a policy of insurance thereon for the sum of \$..... procured by [*the lessee*] in pursuance of said covenant, was still in full force and effect. On the day of, 18..., said policy of insurance expired. The plaintiff thereupon notified defendants to insure said premises as required by said covenant, which they neglected and refused to do.

5. On the day of, 18..., the plaintiff insured the same according to the tenor and provisions of said covenant, and expended therein the sum of \$.....

6. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....¹

No. 149.

Assignee of Lessee for Injury to the Possession.

1. The plaintiff complains of the defendant for that on the day of, 18..., by a certain lease then duly made between and, said demised to [*describe premises*], for a term of years, commencing on the day of, 18...

2. That by virtue of said lease said thereupon entered upon said premises, and on the day of, 18..., while in possession of the same, by his deed duly executed and deliv-

¹ The above is the substance of the petition in the case of *Massury v. Southworth*, 9 O. S., 341.

ered, sold, assigned, and conveyed to plaintiff all his right, title, and interest in said lease and premises.

3. Plaintiff thereupon took possession of the same and is entitled to retain possession thereof for the residue of said term yet unexpired.

4. [*State injury to possession, etc.*]

5. The plaintiff has sustained damages in the premises in the sum of \$:.....

No. 150.

Against Landlord on Covenant for Quiet Enjoyment with Special Damage.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, by lease in writing duly signed and acknowledged, let to the plaintiff the store-room situated on lot, in block No....., in the city of, for the term of years, covenanting in said lease that the plaintiff should quietly enjoy the possession of said premises during said term.

2. The plaintiff thereupon entered into possession of said premises under said lease, but on the day of, 18..., was lawfully evicted therefrom by, who possessed the paramount title to the same.

3. The plaintiff, while in possession of said premises, carried on the business of, and was compelled to expend the sum \$..... in removing his goods to another store-room, and lost the custom of,, and by the removal.

4. The plaintiff has sustained damages in the premises in the sum of \$,.....

No. 151.

Against Tenant for Breach of Covenant to Keep Premises in Repair.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff and defendant signed a lease, by the terms of which the plaintiff leased to the defendant, for the term of years, the following described premises: [*describe them*].

2. The defendant thereupon entered into possession of said premises and occupied the same during the continuance of said lease.

3. The defendant covenanted in said lease that he would, during said term, at his own expense, keep said premises in good repair, and leave the same at the expiration of his lease in as good condition as when he took possession thereof, reasonable wear and tear excepted.

4. The defendant failed to keep said premises in good repair, but on the contrary, neglected to replace the glass in the windows on the side of said house which had been broken during said lease, by reason of which the walls and floors of said house were injured from rain in the sum of \$....., and the plaintiff was compelled to expend the sum of \$..... in replacing said glass, and said defendant permitted said premises to be injured greatly in excess of reasonable wear and tear, to the damage of the plaintiff in the sum of \$.....

No. 152.

Against Landlord for Breach of Agreement to Complete Demised Building According to Agreement.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff and defendant entered into an agreement in writing, duly executed.

2. By the terms of said agreement the defendant contracted to lease to the plaintiff for the term of years, from the day of, 18..., the unfinished building situated on lot, in block, in the city of, and to complete the same in the same manner as the building on lot, in said block, and to give plaintiff possession thereof on the day of, 18...

3. On the day of, 18..., the defendant delivered, and plaintiff took possession of said building under said agreement, and plaintiff placed therein a large quantity of goods [*describe them*], of the value of \$.....

4. Said building was not finished in the same manner as the building on lot, in said block, at the time of entering into said agreement, but on the contrary [*state specifically the difference*].

5. In consequence of the failure of said defendant to complete said building as agreed upon, the water leaked through the roof

of said building and fell upon [*describe property injured*], and soiled and greatly injured the same, to the damage of the plaintiff in the sum of \$.....

No. 153.

On a Promise to Pay for the Surrender of a Lease.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the plaintiff had a lease ending on the day of, 18..., of the dwelling-house situated on lot, in block, in the city of, and was in possession thereof under said lease.

2. The defendant, being the owner of the reversion of said premises, on the day of, 18..., offered the plaintiff the sum of \$..... to surrender to defendant said unexpired term and possession of said premises, which offer the plaintiff then and there accepted, and thereupon surrendered said term and the possession of said premises to defendant.

3. The plaintiff has duly performed all the conditions of said agreement on his part.

4. No part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 154.

By Lessor for Damages for Waste, and for an Injunction to Restrain Waste.

1. The plaintiff complains of the defendant for that the plaintiff is the owner in fee of the north-east quarter of section No. 16, in township 12 N., of R. 14 E., which land is in possession of defendant under a lease from the plaintiff.

2. The defendant, while such tenant, on or about the day of, 18..., wrongfully and without lawful authority cut down ten walnut trees growing on said land, belonging to plaintiff, of the value of \$....., and converted the same to his own use, to the damage of the plaintiff in the sum of \$.....

Second cause of action.

1. The defendant threatens and is about to cut down other trees belonging to plaintiff on said land, without the plaintiff's consent, and convert the same to his own use, which will cause irreparable injury to plaintiff and greatly depreciate the value of said real estate.

2. The plaintiff therefore prays judgment against the defendant for the sum of \$....., his damages, and that the defendant may be perpetually enjoined from cutting down trees on said land, and for costs of suit.

No. 155.

For Rent Reserved in a Lease.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant leased from the plaintiff, for the term of years, the dwelling-house situate on lot in block, in the city of, at a yearly rent of \$....., to be paid on the days of and of each year.

2. The defendant took possession of said premises under said lease, but has not paid the rent for the half year ending on the day of, 18..., amounting to the sum of \$.....

3. There is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 156.

For Use and Occupation at a Fixed Rent.

1. [*As in preceding form.*]

2. The defendant occupied said premises under said lease from the day of, 18..., to the day of, 18..., but has failed to pay the rent due thereon.

3. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 157.

On Judgment of a Court of General Jurisdiction.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff recovered a judgment against the defendant in the court of county, for the sum of \$....., and \$..... costs of suit, in an action then pending in said court, in favor of the plaintiff and against the defendant.

2. Said judgment has not been paid, nor any part thereof, and there is due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 158.

On Judgment of a Justice of the Peace.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff recovered a judgment against the defendant in an action before E. F., a justice of the peace of, in county,, for the sum of \$....., and \$..... costs of suit, in an action then pending before said justice in favor of the plaintiff and against the defendant.

2. Said judgment has not been paid, nor any part thereof, and there is due from the defendant to the plaintiff thereon the sum of \$.....

[*Attach copy of transcript to petition.*]

No. 159.

By Assignee of Judgment.

1. The plaintiff complains of the defendant for that on the day of, 18..., one,, recovered a judgment against the defendant in the court of county,, for the sum of \$....., and \$..... costs of suit, in an action then pending in said court in favor of said and against the defendant.

2. On the day of, 18..., said assigned said judgment to plaintiff, of which the defendant was duly notified.

3. Said judgment has not been paid, nor any part thereof, and there is due from the defendant to the plaintiff thereon the sum of \$.....

No. 160.

For Repayment of a Judgment Collected and Afterwards Reversed.

1. The plaintiff complains of the defendant for that at the term of the district court of county, the defendant recovered a judgment against the plaintiff for the sum of \$.....

2. On the day of, 18..., the plaintiff was compelled to pay to said defendant the sum of \$....., in satisfaction of said judgment.

3. Within one year from the date of the rendition of said judgment the plaintiff took the case [*on error*] to the supreme

court of, when at the January, 18..., term of said court, said judgment was reversed and wholly set aside.

4. No part of said sum has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 161.

For Neglect in Giving Notice of Non-payment of Bill.

1. The plaintiff complains of the defendant for that on the day of, 18..., A. B. was the holder of a bill of exchange, of which the following is a copy:

“ST. LOUIS, July 1, 1879.

“Sixty days from date pay A. B., or order, five hundred dollars, for value received.

“E. F., Lincoln, Neb.”

“C. D.

2. On the day of, 18....., said A. B. indorsed said bill in the words following: “Pay G. H., or order. A. B.”, and delivered the same to plaintiff.

3. That on the day of, 18..., plaintiff delivered to defendant said bill of exchange for presentation to said E. F. for acceptance and payment, and the defendant then, for a valuable consideration, agreed to present, or cause to be presented, to said E. F. said bill of exchange for acceptance and payment, and in case of non-acceptance and non-payment, or either, to cause the same to be protested, and to give all necessary and proper notices to charge the drawer and indorser of said bill.

4. Said E. F. did refuse to accept or pay said bill of exchange, but the said defendant failed and neglected to give said A. B. and C. D. the notices required by law to charge C. D. as drawer and A. B. as indorser thereof, whereby the plaintiff has lost the amount of said bill, to his damage in the sum of \$.....¹

No. 162.

For not Marrying in a Reasonable Time.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, being then unmarried, at

¹ Where a banker receives a negotiable instrument for collection, it is his duty to cause it to be presented for payment at maturity, and if refused protested so as to charge the indorser. The failure to perform this duty will render him liable for the damages occasioned thereby. *Steele v. Russel*, 5 Neb., 211.

the request of the defendant then promised the defendant to marry him, and the defendant promised the plaintiff at the same time to marry her.

2. The plaintiff, relying on said promise of the defendant, has remained sole and unmarried, and has been and still is willing to marry the defendant, of all which the defendant had due notice.

3. Afterwards, to-wit: on the day of, 18..., the plaintiff requested the defendant to marry her, but the defendant has not and would not marry said plaintiff, although a reasonable time has elapsed since he was so requested.

4. The plaintiff has sustained damages in the premises in the sum of \$....., for which she prays judgment.

No. 163.

Where the Defendant has Married Another Person.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff being then unmarried, at the request of the defendant, then promised the defendant to marry him, and the defendant promised the plaintiff at the same time to marry her.

2. The plaintiff, relying upon said promise of the defendant, has remained sole and unmarried.

3. On or about the day of, 18..., said defendant, contrary to said promise, married one G. H. that up to the time of said marriage plaintiff was at all times ready and willing to marry defendant.

4. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 164.

Arbitration and Award. Verbal Submission.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., there being divers controversies between the plaintiff and defendant concerning their debts, dealings, and mutual accounts, and thereupon they, on said day, by mutual agreement appointed A. B. and C. D. to hear and determine

¹ An award on a parol submission is valid and binding until set aside. *Tynan v. Tate*, 3 Neb., 389.

all of the aforesaid controversies for them, and mutually promised each other to abide by and perform the award of said arbitrators. The award to be made before the day of, 18...

2. Said arbitrators, after hearing the parties and the evidence, on the day of, 18..., adjudged upon the premises, and awarded that the defendant should pay the plaintiff on demand the sum of \$....., in full satisfaction and discharge of all said matters in difference and dispute, of all which said defendant then had notice.

3. On the day of, 18..., plaintiff demanded of the defendant the sum so awarded.

4. No part of the same has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 165.

When Submission is by Deed or Bond.

1. The plaintiff complains of the defendant for that on the day of, 18..., there being divers controversies between the plaintiff and defendant concerning their [*debts, dealings, and mutual accounts*], and thereupon they, on said day, by their mutual agreement in writing, submitted the following matters [*particularly describe the matters submitted*], to the final award and determination of A. B., C. D., and E. F., the award of said arbitrators, or any two of them, to be duly made in the premises in writing, after hearing the parties and the evidence, and to be made and delivered to the parties on or before the day of, 18....

2. The plaintiff and defendant, at the time of said submission, mutually promised each other to abide by and perform the award so made.

3. Said arbitrators afterwards met at the time and place agreed upon and heard the plaintiff and defendant upon all the matters submitted to them, and also the evidence submitted by said parties, and thereupon, on the day of, 18..., made and published their award in writing, duly signed, and did thereby award and direct [*set out so much of the award as is necessary to show the plaintiff's right to recover; if the award required the*

plaintiff to perform certain acts as a condition precedent to the right to recover, the petition must allege performance].

4. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 166.

Enlargement of Time.

1. [*As in preceding form.*]

2. On the day of, 18..., and within the time limited for making said award, the plaintiff and defendant, by a written agreement, extended the time for making said award until the day of, 18...

[*Continue as in preceding form.*]

No. 167.

Against Agent for Selling Goods on Credit.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at the defendant's request, employed the defendant for a certain reward to sell for cash the following goods, viz.: [*describe them*], belonging to the plaintiff, of the value of \$.....

2. The defendant then promised the plaintiff to sell the same upon the terms aforesaid, and then received said goods for that purpose. But on or about the day of, 18..., said defendant, without plaintiff's consent, sold a part of said goods upon credit, and otherwise than for cash, to C. D., for the sum of \$....., which sum is still unpaid, and said C. D. is wholly insolvent.

3. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 168.

Against Agent for Disobeying Orders.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at the request of the defendant, employed him for a certain reward to sell [*describe goods*], belonging to the plaintiff, and of the value of \$.....

2. The defendant then promised the plaintiff to obey the orders and directions of said plaintiff in all things relating to the

sale of said goods, and thereupon received the same for the purposes of said sale.

3. The plaintiff afterwards directed said defendant to [*state character of the order in detail*].

4. But said defendant wholly neglected to comply with said order and direction, in consequence of which said goods became greatly injured in value [*state from what particular cause*] to the plaintiff's damage in the sum of \$.....

No. 169.

Against Agent having the Care of an Estate, to Account.

1. The plaintiff complains of the defendant for that said defendant was the agent of plaintiff, and had the care and custody of the following lands [*describe them*], from the day of, 18..., to the day of, 18..., and during that time had the control and management thereof, and had power to improve and demise the same, and to collect the rents, issues, and profits of said premises, to the use of the plaintiff.

2. That defendant collected as such agent, for the use of plaintiff, over and above the charges and expenses, the sum of \$....., no part of which has been paid. There is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 170.

Liability of Principal to Third Parties for Acts of General Agent in Employing Subordinates to carry on Business.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned said defendants were partners doing business under the name and style of F., I. & Co.

2. On the day of, 18..., said defendants, by their duly authorized agent, entered into an agreement in writing with the plaintiff, of which the following is a copy:

[*Copy agreement.*]

3. Upon the execution of said agreement the plaintiff entered into the employment of said defendants under said contract, and thereafter, and between that time and the day of, 18..., rendered ... months services for said defendants under said agreement.

4. The defendants agreed to pay plaintiff for said services

the sum of \$....., no part of which has been paid, although long since due and payable.¹

No. 171.

Against Agent for not using Diligence in Selling Goods.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at the defendant's request, employed him, for an agreed compensation, to sell for plaintiff the following goods, viz.: [*describe them*], of the value of \$, the defendant to use due diligence in selling the same.

2. Said defendant thereupon received said goods for the purpose of said sale, but did not use due diligence in selling the same, but wholly neglected to perform his duty in that regard.

3. By due diligence said defendant could have sold said goods for the sum of \$.....; but actually sold the same on the day of, 18..., for the sum of \$....., and in consequence of said delay in selling said goods the plaintiff was compelled to pay \$..... rent for store-room, and was otherwise greatly injured, in all to his damage in the sum of \$.....

No. 172.

Against Agent for Negligently Selling to Insolvent.

1. [*As in preceding form.*]

2. Said defendant thereupon received said goods for the purposes of said sale, but did not use due diligence in selling the same, but sold said goods to one C. D. who is insolvent, on credit without the consent of plaintiff, and without taking security for the payment thereof, whereby the plaintiff will lose value of such goods to his damage in the sum of \$.....

No. 173.

Against Del Crédere Agent.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff commenced, and until the day of, 18..., continued, to consign to the defendant as their agent large quantities of wheat for sale, which was sold by the defendant.

¹ The above is the substance of the petition in the case of *Furnas, Irish & Co. v. Frankman*, 6 Neb., 429.

2. On the day of, 18..., the defendant sold one thousand bushels of wheat so consigned by plaintiff to him to one C. D. for \$1,500, on thirty days' credit, and delivered the same to him.

3. Said C. D. was at that time and now is insolvent, and has wholly failed to pay for said wheat or any part thereof.

4. The defendant charged and was paid the commission of *del credere* agents in said trade, and had no authority from the plaintiff to sell said wheat on credit, but is liable to account to the plaintiff for the value of the same.

5. Said wheat, at the time of said sale, was of the value of \$..... No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 174.

Against a Note-Broker for Proceeds of Note Discounted.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, employed him to procure to be discounted a note for the sum of \$....., belonging to plaintiff.

2. On the day of, 18..., one E. F. discounted said note, paying defendant as the proceeds thereof the sum of \$.....

3. The just charges and commissions of said defendant in procuring said note to be discounted amount to \$.....

4. On the day of, 18..., the plaintiff demanded of the defendant payment of the amount due him on said note, being \$....., which was refused.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 175.

Against Agent for Not Rendering an Account.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff employed the defendant as his agent to take charge of, lease, and collect the rents of all the buildings situate on block, in the city of, for the year then next ensuing, and to pay the amount thus collected, less his reasonable charges, to plaintiff.

2. The defendant thereupon took charge of said buildings and leased all the store-rooms and apartments therein, and collected the rent for the same.

3. The rents so collected by said defendant on said buildings, after deducting his reasonable charges, amount to the sum of \$....., no part of which has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 176.

For Failure of Agent to Account for Goods Sold.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff delivered to the defendant at his request the following goods, viz.: [*describe goods*], belonging to the plaintiff, and of the value of \$....., to be sold for cash by said defendant for compensation to be paid to him by plaintiff.

2. Said defendant sold said goods between the day of, 18..., and the day of, 18..., but has failed to account for the same to plaintiff.

3. On the day of, 18..., the plaintiff demanded of said defendant the amount due plaintiff for said goods, which he refused to pay.

4. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 177.

Against an Agent for Money Collected on Policies.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff employed the defendant to collect certain policy fees, a list of which is hereto attached, marked "Ex. A," and when collected to pay the same, after deducting his reasonable charges, to the plaintiff.

2. The defendant, as such agent, collected the sum of \$..... upon said policies, from which the defendant is entitled to have deducted the sum of \$..... for his reasonable charges for collecting the same.

3. On the day of, 18..., the plaintiff demanded of defendant the amount collected on said policies, less his reasonable charges, which he refused to pay. No part thereof has

been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 178.

Against an Attorney for Negligence in Defending an Action.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was an attorney at law in the practice of his profession, and as such, for a reward then paid to him by the plaintiff, promised to defend, on behalf of plaintiff, an action then pending in the court of county, wherein was plaintiff and the plaintiff herein defendant.

2. The plaintiff had a complete defense to said action, which on said day he communicated to said attorney, who promised to interpose the same by answer as a defense to said action.

3. Such answer was required to be filed on or before the day of, 18..., but said defendant failed to prepare and file an answer to said petition, or to set up the defense communicated to him by plaintiff.

4. In consequence of said neglect of the defendant, on the day of, 18..., default was taken in said action against the plaintiff, and judgment was thereupon rendered against him for the sum of \$....., which he was compelled to pay, and was also compelled to pay the sum of \$..... as costs in said action.

5. The plaintiff relied upon said defendant to attend to the defense of said action, and was not aware that judgment had been obtained against him by default until the day of, 18..., when it was too late to have the same set aside.

6. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 179.

Against an Attorney for Negligence in Conducting a Suit.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned, the defendant was an attorney at law in the practice of his profession, and as such on the day of, 18..., the plaintiff retained and employed him to prosecute in the district court of county, an action against

one C. D. for converting to his own use certain goods belonging to plaintiff of the value of \$.....

2. The defendant then accepted said retainer and employment, and promised the plaintiff to use proper care and diligence in the prosecution of said action.

3. The defendant did not use proper care and diligence in prosecuting said action in this [*that he failed to offer in evidence an assignment in writing of said goods by said C. D. to the plaintiff*], although the instrument had been previously delivered to him by the plaintiff to be read as evidence on said trial.

4. By reason of said neglect of the defendant the plaintiff was defeated in said action, and judgment was rendered against him dismissing the action and for costs, and he was thereby prevented from recovering the value of said goods from said C. D., and was compelled to pay the costs of suit amounting to the sum of \$....., and has also lost \$..... paid the defendant as fees during the progress of said cause.

5. The plaintiff has sustained damages in the premises in the sum of \$.....

NO. 180.

*Against an Attorney for Negligence in Examining Title.*¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff being about to purchase from C. D. the following described real estate, viz.: [*describe premises*], for the sum of \$....., employed the defendant, who was an attorney at law and practicing his profession, to examine the title of said C. D. to said real estate, and ascertain if his title was good, and what incumbrances, if any, existed thereon.

2. The defendant, for compensation, accepted said employment, and made an examination of said title, and reported to the plaintiff that the title of said C. D. to said real estate was good, and that no incumbrances existed against said land on the record.

3. The plaintiff, relying upon said examination of title by the

¹In the case of the *National Savings Bank v. Wood*, 21 Albany Law Journal, 206, the supreme court of the United States held that an attorney examining a title and reporting it free from incumbrances is not liable to a stranger for neglect of duty, who was thereby induced to loan money on the land, there being no privity between them.

defendant, was thereby induced to purchase said real estate from said C. D. for the sum of \$....., upon payment of which the plaintiff received from him a deed therefor.

4. The records did not show that said real estate was free from incumbrances at the time said defendant made said examination, but on the contrary that there was then on said records a mortgage from said C. D. to E. F., upon said premises, for the sum of \$....., still uncanceled and unpaid, and the plaintiff, on the day of, 18..., was compelled to pay the sum of \$..... to cancel the same.

5. Said C. D. is insolvent. The plaintiff has sustained damages in the premises in the sum of \$....., no part of which has been paid.

No. 181.

*By Public Officer in His Own Name to Recover Public Money.*¹

1. The plaintiff complains of the defendant, and for cause of action states that the plaintiff is the lawful treasurer of county, and has been such treasurer since the day of, 18..., and that his term of office will not expire until the day of, 18...

2. The city of now is, and at the time hereinafter stated was, a city of the second class, duly organized under the laws of the state of Nebraska.

3. That under the provisions of Chapter 29 of the Laws of 1866, licenses were issued by the proper authorities of said city to various individuals to sell malt, spirituous, and vinous liquors in said city, for which it received large sums of money.

4. The persons to whom such licenses were issued, the date of the same, and the amount of money received for each license granted, are as follows, to-wit: [*give list of names, dates, and amount of money received from each*].

5. The whole amount of money received for said licenses by said defendant is the sum of \$....., which said defendant has unlawfully appropriated to its own use.

6. On the day of, 18..., the plaintiff duly de-

¹ The above is the substance of the petition in *White v. The City of Lincoln*, 5 Neb., 505.

manded of the treasurer of said defendant, at his office in said city, said sum of money, but said treasurer refused to pay the same or any part thereof.

7. Said money belongs to the school fund of county, and the plaintiff, as treasurer of said county, is entitled to receive the same. No part thereof has been paid, and there is now due from the defendant to the plaintiff as such treasurer thereon the sum of \$....., with interest from the day of, 18....

NO. 182.

To Recover Money Paid Under a Mistake of Fact.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff purchased from the defendant one hundred and eighty-two head of cattle, for which the plaintiff was to pay the defendant ... cents per pound, gross weight.

2. Pursuant to said agreement the plaintiff and defendant weighed said cattle and the aggregate weight thereof was found to be two hundred and seventeen thousand nine hundred and forty-one pounds, for which plaintiff paid the defendant ... cents per pound, amounting to \$.....

3. Said cattle were weighed in twenty-seven different parcels, and owing to a mistake in balancing the scales, five hundred pounds were added to each draft more than the actual weight of the cattle. The actual weight of said cattle being but pounds.

4. On the day of, 18..., the plaintiff discovered said mistake, and that he had overpaid said defendant for said cattle the sum of \$..... He then requested said defendant to repay said sum, which he refused to do.

5. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....¹

NO. 183.

Against Bailee without Reward.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the plaintiff, at defendant's

¹ The above is the substance of the petition in *Billings v. McCoy*, 5 Neb., 187.

request, delivered to defendant for safe keeping the following goods: [*describe them*], belonging to the plaintiff, and of the value of \$....., to be safely and securely kept by defendant for the plaintiff, and to be re-delivered by defendant to the plaintiff upon his demand.

2. Said defendant then received said goods upon the above conditions.

3. The plaintiff demanded a re-delivery of said goods of the defendant on or about the day of, 18..., but the defendant did not safely keep the same, but said goods were lost and destroyed through the negligence and carelessness of defendant, and defendant did not re-deliver said goods nor any part thereof to plaintiff, whereby plaintiff has sustained damages in the sum of \$.....

If the goods are merely damaged, the form can be so changed stating the amount of loss sustained.

No. 184.

The Same.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff deposited with the defendant an oil painting belonging to plaintiff of the value of \$....., to be safely kept by the defendant without reward and delivered to the plaintiff upon request, and the defendant then received said painting upon the terms aforesaid.

2. The defendant negligently placed and kept said painting in a damp cellar, in violation of his duty, by reason of which it was entirely ruined, to the damage of plaintiff in the sum of \$.....

No. 185.

Against Pawnbroker for Losing a Pledge.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant was a pawnbroker, and thereupon the plaintiff on said day delivered to the defendant, at his request, the following goods: [*describe them*], the property of plaintiff, and of the value of \$....., by way of pledge to said defendant, for the sum of \$....., then and there advanced by the defendant to the plaintiff thereon.

2. The defendant promised the plaintiff to take due and proper care of said goods until they should be redeemed by plaintiff within days from that date, or sold by the defendant according to law. Thereupon said goods were delivered to the defendant.

3. The defendant did not take due and proper care of said goods until they were redeemed by plaintiff or sold according to law, but on the contrary so negligently kept the same that they were lost and destroyed. [*If only damaged state the injury and amount of damage.*]

4. Said goods were not sold by said defendant as required by law, and on the day of, 18..., the plaintiff tendered to the defendant the amount of money due thereon, and demanded a re-delivery of said goods, which was refused, and said goods have not been delivered to plaintiff, to his damage in the sum of \$.....

No. 186.

Against the Hirer of a Horse for Carelessness:

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, let to him and delivered to defendant a certain horse, the property of plaintiff, of the value of \$....., to go and perform a journey therewith from to, and thence back again, for a reward then promised the plaintiff.

2. Said defendant promised the plaintiff to use said horse in a careful, prudent manner, and to take proper care of the same, and thereupon received said horse on the terms aforesaid.

3. The defendant did not use said horse in a careful, prudent manner, but on the contrary rode [*or drove*] the same immoderately in performing said journey, and did not take proper care of the same, whereby said horse [*state the injury*] to the damage of plaintiff in the sum of \$.....

No. 187.

Against Bailee receiving an Article to Bestow Thereon Work and Labor for a Reward.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant being a [*describe trade*],

and carrying on that trade, the plaintiff, at the defendant's request, delivered to defendant [*describe property*], the property of plaintiff of the value of \$....., to be repaired by said defendant in the way of his trade, for a reasonable reward to be paid by the plaintiff.

2. The defendant thereupon promised the plaintiff to repair said in a skillful and workmanlike manner, and to take due and proper care thereof until the same should be returned by the defendant to the plaintiff.

3. Said defendant did not repair said in a good and workmanlike manner, but on the contrary made said repairs in so careless and unskillful a manner, and neglected to take proper care of said, whereby said property was greatly injured, and the value of the same diminished in the sum of \$..... to the damage of plaintiff in the sum of \$.....

NO. 188.

By Employee v. Employer for not Receiving Him into his Service.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, agreed with the defendant to enter into his employment for the period of as [.....] at the rate of \$..... per

2. The defendant then employed the plaintiff as aforesaid, and agreed to pay him for such services the sum above stated.

3. The plaintiff, relying upon the agreement of said defendant, has at all times been ready to enter into the service of said defendant, according to said agreement, and on the day of, 18..., requested the defendant to receive and retain him in such service for the wages above set forth. But the defendant then refused and still refuses so to do.

4. The plaintiff, in consequence of said employment, was prevented from engaging in the service of other parties, but since said refusal of defendant has remained out of employment for the space of, to his damage in the sum of \$.....

NO. 189.

Forbearance to a Third Person.

1. The plaintiff complains of the defendant for that on the day of, 18..., one was indebted to the plain-

tiff in the sum of \$....., then due and payable; that on said day the defendant requested the plaintiff to extend the time of payment of said debt until the day of, 18, on consideration whereof the defendant promised the plaintiff to pay said sum in case said did not pay the same on or before the day of, 18...

2. The plaintiff, relying upon said promise of the defendant, did extend the time to said for the payment of said sum until the day of, 18..., which time has since elapsed, but said has not paid said sum nor any part thereof, of all which the defendant was duly notified on the day of, 18..., yet said defendant has not paid said sum of money nor any part thereof. The plaintiff therefore prays judgment against the defendant for the sum of \$.....

No. 190.

Corporations, and Stockholders Therein.

Corporations, foreign and domestic, must sue in their *corporate name*, and must be sued in the same manner. This rule applies to all public as well as private corporations, thus: *The City of v. The City of The Union Pacific Railroad Company v. The Burlington and Missouri River Railroad Company in Nebraska.*

Corporations cannot be created by special law in this state. Art. XI. Constitution.

All corporations may sue and be sued in like cases as natural persons. Sec. 3, Id.

The general law under which an association is formed, and the articles of incorporation adopted and filed as required, taken together, are in law considered in the nature of a grant from the state, and as the charter of the corporation. *Abbott v. O. S. Co.*, 4 Neb., 422.

The mere act of organization by individuals does not confer a corporate power. No corporate franchise or power exists *until the articles of incorporation are filed* as required by the statute. Id.

Partners. Where persons organize as an association for the transaction of business, assuming to be and act together as a corporation, without any color of a corporate franchise, they are regarded in law as partners, and no member of such organization

can escape liability on the ground that he was not a subscriber to the stock of the corporation. *Id.*, 424-5.

Before an action will lie against a subscriber upon his subscription to recover assessments the entire amount of capital stock fixed by the articles must be in good faith subscribed, unless there is a provision in the articles to proceed with the accomplishment of the main design with a less subscription than the whole amount specified, unless there is a waiver by the subscribers of the conditions. *Livesey v. O. Hotel Co.*, 5 Neb. 50.

No. 191.

Against Incorporators as Partners for Failing to File Articles of Incorporation.

1. The plaintiff complains of the defendants for that at the time hereinafter specified the defendants were partners, doing business under the firm name and style of the [name of corporation], at, in the state of

2. On the day of, 18..., the defendants, as partners aforesaid, became indebted to the plaintiff in the sum of \$..... for moneys paid out and expended by the plaintiff for the defendants, at their request, which money is now due and payable.

3. No part thereof has been paid, and there is now due from the defendants to the plaintiff thereon the sum of \$.....¹

No. 192.

Against Stockholders of a Corporation for Failure to Publish Statement of Financial Condition as required by Law.

1. The plaintiff complains of the defendants for that on or about the day of, 18..., the plaintiff sold to the defendant, a corporation organized under the laws of the state of Nebraska [one hundred kegs of nails], at the request of said corporation, for the sum of \$....., then agreed to be paid.

2. The defendants, at the time of the purchase of said [nails], were and now are stockholders and members of said corporation.

3. No part of said debt has been paid.

4. Said corporation, at the date of said purchase, was and now is wholly insolvent.

5. Said defendants for more than one year prior to the time

¹ The above is the substance of the petition in *Abbott v. O. S. Co.*, 4 Neb., 442.

of said purchase had wholly failed to give the annual notice in a newspaper of the existing debts of the corporation as required by section 136 of the chapter entitled "Corporations," and no such notice has been published since the day of, 18...

6. The corporation having failed to publish the notice required by law, the plaintiff alleges that said defendants are personally liable for debts contracted by said corporation while thus in default.

7. There is now due from the defendants thereon to the plaintiff the sum of \$.....¹

No. 193.

By Corporation on Stock Assessments.

1. The plaintiff is a corporation duly organized under the laws of the state of, and lawfully authorized to carry on the business of therein.

2. On the day of, 18..., the defendant and divers other persons associated themselves together for the purpose of organizing said corporation, and made and subscribed an agreement in writing, of which the following is a copy:

[*Copy subscription for stock.*]

3. That the amount of capital stock of said corporation is the sum of \$....., of which the defendant by said subscription agreed to take and pay for ten shares, at \$100 each, amounting to \$1,000, and on the day of, 18..., paid thereon ten per cent.

4. ²On the day of, 18..., the entire amount of capital stock required by the certificate of organization of said corporation was subscribed, to-wit: the sum of \$.....

5. On the day of, 18..., at a regular meeting of the board of directors of said corporation an assessment of ten per cent of the par value of each share of the capital stock of said corporation was duly levied thereon in conformity to said subscription and the charter and by-laws of said corporation, of which the defendant was then duly notified.

¹ The above is the substance of the petition in *Steele v. Alexis Mer. Asso.*, 8 Neb.

² See *Livesey v. Omaha Hotel Co.*, 5 Neb., 50. *Salem Mill Dam Co. v. Ropes*, 6 Pick., 23.

6. Said defendant, at the time of the levy of said assessment, was and now is a subscriber to ten shares of said capital stock.

7. The plaintiff has duly performed all the conditions thereof on its part to be performed.

8. No part of said assessment has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 194.

Against a Municipal Corporation upon an Account.

1. The plaintiff complains of the defendant for that said defendant is a municipal corporation created by the laws of the state of

2. On the day of, 18..., the plaintiff filed with the clerk of said [county] an account against the same belonging to plaintiff, properly verified as required by law. The following is a copy of said account:

[Copy account.]

3. On the day of, 18..., the county board of said county disallowed said account, from which order disallowing the same the plaintiff, on the day of, 18..., appealed to the district court.

4. No part thereof has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 195.

On a Subscription to the Expenses of a Public Enterprise.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was and now is a corporation duly organized under the laws of the state of for the purpose of [state object].

2. The plaintiff, in the year 18..., was erecting [or about to erect] a building for [state purpose].

3. The defendant, to enable the plaintiff to complete said building, and in consideration of the like agreement and subscriptions of other parties, subscribed and promised to pay the plaintiff the sum of \$..... for that purpose.

4. Relying upon said subscription of the defendant, the plaintiff let the contract for the completion of said building and completed the same, and thereby expended the sum of \$....., and

has duly performed all the conditions thereof on its part to be performed.

5. No part of the defendant's subscription has been paid, and there is now due from the defendant to the plaintiff thereon the sum of \$.....

No. 196.

For Carriage of Goods in Wagons.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the plaintiff, at the defendant's request, carried and conveyed one thousand bushels of wheat in wagons for the defendant, from to, for which the defendant agreed to pay him the sum of \$....., no part of which has been paid.

2. There is now due from the defendant to the plaintiff for said transportation the sum of \$....., with interest from the day of, 18...

No. 197.

To Recover for Freight Charges.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant delivered to the plaintiff the following goods: [*copy bill*], to be carried and conveyed in, from to, and there delivered to, all of which has been duly performed by said plaintiff; and for which defendant agreed to pay him the sum of \$..... [*or that the carriage of said goods was reasonably worth the sum of \$.....*].

2. No part of the same has been paid, and there is now due to the plaintiff from the defendant thereon the sum of \$....., with interest from the day of, 18....

No. 198.

By Warehouseman, to Recover Charges.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, stored in his warehouse, in the town of, four bales of goods, and retained the same in said warehouse until, for which the defendant agreed to pay the plaintiff the sum of \$.....

2. No part thereof has been paid, and there is now due

thereon from the defendants to the plaintiff the sum of \$....., with interest from the.....day of....., 18....

No. 199.

Against Warehouseman for Injury to Goods by Negligence.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant kept a warehouse at, and in consideration of a reward then paid to him by the plaintiff, agreed to stow and safely keep in said warehouse the following goods, viz.: [*describe them*], belonging to plaintiff, of the value of \$.....; and the defendant as warehouseman then received said goods.

2. At the time said goods were delivered to the defendant the plaintiff informed him that it was necessary for their preservation that they should be kept dry.

3. The defendant, while said goods were in said warehouse, negligently permitted said goods to become wet, whereby the same were soiled, mildewed, and greatly injured, to the damage of plaintiff in the sum of \$.....

No. 200.

Common Assault.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant unlawfully made an assault upon the plaintiff, and him, the said plaintiff, did then and there beat, wound, and ill-treat,* to plaintiff's damage in the sum of \$.....

No. 201

Special Damages.

If special damages have been sustained, such as injury to the person or clothing, they must be pleaded. Follow the above form to the*, then state according to the nature of the injury, thus:

By striking plaintiff on the arm violently with a stick, whereby plaintiff's right arm was bruised [*or broken*] so that he was unable to attend to his business for months, and was compelled to expend for the services of a physician in setting said arm and caring for said wounds the sum of \$....., etc., to the damage of plaintiff in the sum of \$.....

No. 202.

Damages for an Assault upon a Servant, Son, or Daughter.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant unlawfully made an assault upon one C. D., then and still being the servant of the plaintiff, and beat, wounded, and ill-treated the said C. D., whereby he became sick, lame, and disordered, and so remained for months, during all which time the plaintiff was deprived of the services of said C. D., and necessarily expended the sum of \$..... for medicines, care, and attendance upon him, to the damage of the plaintiff in the sum of \$.....

A wife may maintain an action in her own name for an injury to her person or property. *Omaha H. Railway Co. v. Doolittle*, 7 Neb., 481.

No. 203.

For Debauching a Servant.

1. The plaintiff complains of the defendant for that on the day of, 18..., and at other times between said day and the commencement of this action, said defendant, unjustly intending to deprive the plaintiff of the services of E. A., [*the daughter and*] servant of plaintiff, did debauch and carnally know one E. A., then and from thence to this time the [*daughter and*] servant of the plaintiff, whereby said E. A. became pregnant and sick with child, and so continued for the space of nine months then next following, when she was delivered of the child with which she was pregnant as aforesaid.

2. By reason of which said E. A. was unable to perform the necessary affairs and business of the plaintiff for the space of year, the services of said E. A. during all that time being lost to plaintiff, and plaintiff necessarily expended in nursing and taking care of said [*daughter and*] servant in and about the delivery of said child the sum of \$.....

3. The plaintiff has sustained damages in the premises in the sum of \$.....¹

¹ The above is the substance of the declaration. 2 Chitty's Pl., 643. The allegation of intention to deprive of services is probably unnecessary. The master alone can maintain the action, the loss of service being the gist of the action.

No. 204.

Criminal Conversation.

1. The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that time and the commencement of this action, said defendant wrongfully, wickedly, and unjustly debauched and carnally knew one C. D., then and still being the wife of plaintiff, and thereby the affection of said C. D. for plaintiff was alienated and destroyed, and the plaintiff has been deprived of the comfort, fellowship, society, and assistance of his said wife in his domestic affairs, and has been brought into dishonor and disgrace, to his damage in the sum of \$.....

No. 205

False Imprisonment.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant unlawfully and with force assaulted the plaintiff, and then and there imprisoned him, and detained him in prison there, against the will of plaintiff, for the space of next following, without any reasonable or probable cause whatsoever, to plaintiff's damage in the sum of \$.....

No. 206.

Malicious Prosecution.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant falsely and maliciously, and without reasonable or probable cause therefor, charged the plaintiff before, a justice of the peace, of county,, with [*state offense in the words of the information*], and thereupon caused said justice to make out a warrant in due form of law under his hand, for the apprehension of plaintiff, and falsely and maliciously, and without probable cause therefor, caused plaintiff to be arrested on said charge of defendant, and to be imprisoned against his will in the jail of county for the period of days then next following.

2. On the trial of said cause on the day of, 18..., said defendant was acquitted and discharged of said crime, and said prosecution is now ended and wholly determined.

3. By means of which said several premises the plaintiff has

been greatly injured in his credit and reputation, and brought into public scandal, infamy, and disgrace, and has suffered great anxiety and pain of body and mind, and has been forced to lay out and expend the sum of \$..... in procuring his discharge from said imprisonment and in defending himself, and has been prevented by reason of the premises from transacting his business for the space of days, to the damage of plaintiff in the sum of \$.....¹

No. 207.

For Causing Plaintiff to be Indicted.

The plaintiff complains of the defendant for that on the day of, 18..., said defendant, at the term of the district court of county,, falsely and maliciously, and without reasonable or probable cause, indicted² and caused and procured the plaintiff to be indicted by the grand jury of county for [*state the offense as in the indictment*]; and afterward said defendant falsely and maliciously and without reasonable or probable cause prosecuted and caused to be prosecuted said indictment against the plaintiff until at the term of the court, begun and held in said county on the day of, 18..., said plaintiff was in due manner and by due course of law acquitted of said premises in said indictment charged upon him by a jury of said county of; whereupon it was adjudged by said court that the plaintiff go hence without day, and be discharged from all liability on said indictment. [*State damages and prayer for judgment, as in preceding form.*]

¹ The above is the substance of the declaration in Chitty on Pleading, page 607, omitting what is deemed to be unnecessary. It is unnecessary to allege that the plaintiff has always conducted himself properly, and had never been accused of crime prior to the institution of the criminal proceedings, as such is the presumption, and it is also unnecessary to set forth the various continuances. Want of probable cause is *essential* to a right to recover. If probable cause existed the defendant is not liable, although the prosecution was malicious. The essential elements which constitute a *defense* to the action are, absence of malice, an honest belief in the guilt of the party charged, and a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person is guilty of the offence with which he is charged. These two elements must unite. *Turner v. O'Brien*, 8 Neb., 544.

² The word "indicted" is found in Chitty's form, and is said to be the usual allegation. 2 Barr, 993.

No. 208.

LIBEL.

For Libel Directly Charging an Offense.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, wickedly intending to injure the plaintiff, did maliciously publish of and concerning the plaintiff a certain false, scandalous, and defamatory libel, containing among other things the false, scandalous, and defamatory matters following of and concerning the plaintiff. [*Copy libelous matter verbatim, with, if necessary, proper innuendoes.*]¹

2. By reason of which the plaintiff has been brought into public scandal and disgrace, and greatly injured in his good name, to his damage in the sum of \$.....²

No. 209.

SLANDER.

Words not in Themselves Actionable.

1. The plaintiff complains of the defendant for that at a term of the court of county, begun and held in said county on the day of, 18..., in a certain action then pending therein between as plaintiff and as defendant, upon the trial thereof, the plaintiff, being duly sworn in said cause, testified as a witness touching certain matters material to the issue therein.

2. Afterwards, on the day of, 18..., the defendant, wickedly intending to injure the plaintiff, and to cause it to be believed that he had been guilty of perjury, in a certain discourse which he then had of and concerning the plaintiff, in the presence and hearing of divers persons, did maliciously and falsely speak and publish of and concerning the plaintiff, and of and concerning his testimony aforesaid, the following false and

¹ An innuendo may be defined to be a subordinate averment, connecting particular parts of the publication with what has gone before, in order to elucidate the defendant's meaning more fully. 1 Starkie on Slander, 431. Its office is to explain doubtful words and phrases, and annex to them their proper meaning, but it cannot extend their sense beyond their natural import, unless something is put upon the record by way of introductory matter, with which they can be connected. See note 1 to § 335 Townsend on Slander and Libel.

² The good character of the plaintiff is presumed; it is unnecessary, therefore, to allege that he was of good name and reputation.

defamatory words—that is to say: “He,” meaning the plaintiff, “has forsworn himself,” thereby meaning that the plaintiff in his testimony had committed the crime of perjury, by reason of which the plaintiff has been brought into public scandal and disgrace, and greatly injured in his good name, to his damage in the sum of \$.....¹

No. 210.

Words in Themselves Actionable.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, wickedly intending to injure the plaintiff in a certain discourse which he then had of and concerning the plaintiff, in the presence and hearing of divers persons,* falsely and maliciously did speak and publish the following false and defamatory words—that is to say: “He,” meaning the plaintiff, “is a thief—he stole \$100.” By means of the premises the plaintiff has been greatly injured in his good name, to his damage in the sum of \$.....

No. 211.

1. If the words were spoken in other language than the English, follow the preceding form to the *, then say: who understood the language, falsely and maliciously did speak and publish the following false and defamatory words in the language—that is to say: [*set forth the words in the foreign language*], which words signified, and were understood by those hearing them to mean in the English language as follows: [*set forth a correct translation of the words, with proper innuendoes*], which words were understood as above translated by those persons in whose hearing and presence they were spoken. By means of the premises the plaintiff has sustained damages in the sum of \$.....

No. 212.

For Injury to an Attorney in his Profession.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was and still is an attor-

¹ When the terms of an alleged libel are general or indefinite the petition must contain averments that the alleged libel was published *of and concerning the plaintiff*. *Geisler v. Brown*, 6 Neb., 254.

ney at law duly admitted to practice, and practicing in the several courts of the state.

2. The defendant, maliciously intending to injure said plaintiff in his profession of an attorney at law, did on said day publish of and concerning the plaintiff, and of and concerning him in his capacity as an attorney at law, in the presence and hearing of divers persons, the following false, malicious, and defamatory matter of and concerning the plaintiff and of and concerning him in his profession as an attorney at law—that is to say: [*here insert the slanderous words with proper innuendoes*].

2. By means of which said premises the plaintiff has been and is greatly injured in his reputation aforesaid, and has been greatly vexed, harassed, and impoverished, and has lost and been deprived of divers great gains and profits, which would otherwise have arisen to him in his profession and business, to his damage in the sum of \$.....

No. 213.

Injury to Business.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was engaged in the business of, at, and in good reputation and credit therein; that plaintiff is still engaged in said business at said place.

2. That on the day above stated the defendant, intending to injure the plaintiff in his good name and credit, in a discourse he then had with several persons, did speak and publish of and concerning the plaintiff, and of and concerning him in his business aforesaid, in the presence and hearing of divers persons, the false and malicious words following, that is to say: [*here state the slanderous words, with proper innuendoes*].

3. By means of the committing of which said several grievances the plaintiff has been and is greatly injured in his good name and credit, insomuch that various persons who formerly dealt with plaintiff in his business, to-wit: [*designate those not trading*], have ceased and refused to do business with him, whereby the plaintiff has lost great gains which otherwise would have accrued to him in his business, to his damage in the sum of \$.....

No. 214.

Special Damages. Words Spoken Ironically.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, wickedly intending to injure the plaintiff in a certain discourse which he then had of and concerning the plaintiff, in the presence and hearing of divers persons, in an ironical manner falsely and maliciously did speak and publish the following false and defamatory words of and concerning the plaintiff, that is to say: "He," meaning the plaintiff, "is no thief," thereby, then and there, meaning that said plaintiff had been and was a thief, and said persons in whose hearing said defamatory words were spoken then and there understood that that was the meaning of said words.

2. By reason of the speaking of which slanderous words the plaintiff was discharged from the employment of for compensation, and who, but for said defamatory words, would have retained him in said employment.

[Or, plaintiff was employed as a teacher for the term of months, by school district No. ..., to teach the school of said district, but in consequence of the speaking of said slanderous words suspicion was cast on the moral character of plaintiff, and he was unable, upon that ground alone, to obtain a certificate from the county superintendent of county, and was thereby unable to fulfill said contract, and was thereafter for the period of months unable to obtain employment]. By reason of which said premises the plaintiff has been greatly injured in his good name and reputation, and in loss of time, to his damage in the sum of \$.....

The plaintiff therefore prays judgment for the sum of \$.....

No. 215.

For Not Repairing a Privy Vault Adjoining Plaintiff's Dwelling.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, lawfully possessed of a dwelling-house with the appurtenances, situate on lot, in block, in the of, in county, in which dwelling-house, with

¹See *Kearney v. Farrell*, 28 Conn., 317.

the appurtenances, the plaintiff and his family, since the day and year aforesaid, have resided and still do reside.

2. Said defendant was on said day, and from that time until the present, and still is, possessed of a certain other dwelling-house, with the appurtenances, situate upon lot, in block, in said and county, and of a certain privy on said lot, adjoining the dwelling-house of plaintiff.

3. It is the duty of said defendant to keep the vault of said privy adjoining the premises of plaintiff in good repair, yet said defendant, well knowing the premises, for a long space of time, to-wit: since the day of, 18..., until the present time, has wrongfully and unjustly permitted said vault to remain out of repair, by means whereof, during all the time above stated, large quantities of excrescence flowed out of said privy upon the premises of plaintiff, and remained there during all of said time; and also during said time noxious and offensive stench and vapors came from said privy into said premises of plaintiff and annoyed and incommoded the plaintiff and his family, and have prevented plaintiff from carrying on his business of as profitably as he otherwise could have done, and have deprived him of great gains and profits which otherwise he could have acquired, to his damage in the sum of \$.....

No. 216.

For Keeping a Slaughter-house Near Plaintiff's House.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, lawfully possessed of a certain dwelling-house and appurtenances, situate on lot, in block, in the city of, in county, in which dwelling-house the plaintiff carried on the business of a schoolmaster; and together with his family, and scholars by him boarded and lodged in his said dwelling-house, dwelt, and still do inhabit and dwell therein.

2. Said defendant at the time above stated was, and from thence hitherto and still is, possessed of a certain piece of ground near the said dwelling-house of plaintiff, and on or about the day of, 18..., wrongfully and injuriously erected

on said piece of ground a slaughter-house, and also cattle pens, sheep pens, and hog sties, and has wrongfully and injuriously kept and continued the same from the day and year aforesaid, and on divers days and times during said time has slaughtered oxen, calves, sheep, and hogs in said slaughter-house, and placed in and near the same large quantities of blood, garbage, and offal arising from the carcasses of the animals so slaughtered, and wrongfully and injuriously permitting the same to remain.

3. Whereby, during the time aforesaid, noxious and offensive smells and stenches arising from said blood, garbage, and offal penetrated the dwelling-house of plaintiff and rendered the same unwholesome and uninhabitable, and greatly annoyed, incommoded, and disturbed the plaintiff, his family, and scholars; and has greatly injured the plaintiff in his business of schoolmaster, to his damage in the sum of \$.....

No. 217.

For Cutting Down Trees in an Avenue to the Shade of which Plaintiff was Entitled.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, lawfully possessed of a certain dwelling-house, with the appurtenances, situate on lot, in block, on avenue, in the town of in county, and by reason thereof, during all the time aforesaid, was and still is lawfully entitled to the use and enjoyment of avenue adjoining and leading to said dwelling-house, and to the shade, shelter, protection, and ornament of certain trees, viz.: ten elm trees growing in and upon said avenue.

2. The defendant, on the day above stated, and on divers other days and times between that day and the commencement of this action, wrongfully and unlawfully cut down and removed said trees. By means whereof the plaintiff has been obstructed and prejudiced in the use and enjoyment of said avenue, and has been deprived of the shade, shelter, protection, and ornament of the trees so cut down and removed, to his damage in the sum of \$.....

No. 218.

For Manufacturing Contiguous to Plaintiff's Dwelling.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, lawfully possessed of a certain dwelling-house and appurtenances, situate on lot, in block, in, in county, in which the plaintiff and his family then and still reside.

2. Said defendant, at the time above stated, and from thence hitherto and still is, possessed of a piece of ground contiguous to said dwelling-house of plaintiff, upon which said defendant, on or about the day of, 18..., erected a building, in which from said time until now he wrongfully and injuriously carried on the business of, and manufactured large quantities of

3. By means of which several premises, noxious and offensive vapors and fumes have proceeded from said building, and entered into and spread themselves over said dwelling-house and premises of plaintiff, and have greatly annoyed and incommoded the plaintiff in the use of the same, and have made said dwelling unfit for a residence, to the plaintiff's damage in the sum of \$.....

No. 219.

For Obstructing Ancient Windows.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, lawfully possessed of a dwelling-house, with the appurtenances, situate on lot, in block, in the city of, in county, in which dwelling-house, during all the time aforesaid, there were ancient windows, through which during all of said period the light and air entered into said dwelling-house for the convenient and wholesome use and enjoyment thereof.

2. The defendant wrongfully and injuriously, on or about the day of, 18..., erected and raised a certain wall and

¹ The doctrine of the common law as to a prescriptive right to light and air is generally in the absence of an express or implied grant to that end, *held*, not applicable to this country.

building near to said windows, and wrongfully and injuriously has kept and continued said wall and building until the present time.

3. By means of which said premises the said dwelling-house, with the appurtenances, during all of the time aforesaid were and are greatly darkened, and the light and air prevented from coming in at said windows, thereby rendering said dwelling close and uncomfortable, and unfit for habitation. And also by means of said premises the plaintiff has been compelled, in order to obtain light in said dwelling, to expend the sum of \$..... in making a skylight therein. The plaintiff has sustained damages in the sum of \$.....

No. 220.

For Negligently Undermining Plaintiff's Buildings.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was lawfully possessed of the following real estate, to-wit: lot in block, in the city of, in county, with the dwelling-house thereon; said premises adjoin certain lands of the defendant, and said dwelling-house of right rested upon and was supported in part by said contiguous lands and by the strata under the same.

2. On the day of, 18..., and on other days since that time, the defendant wrongfully and negligently dug excavations in the earth, near the foundations of plaintiff's said house, without taking proper and necessary precautions to prevent injury to the same, by reason whereof the foundations of said house were greatly weakened and gave way, thereby causing said house to fall down and be destroyed, to plaintiff's damage in the sum of \$.....

No. 221.

For Keeping Hatchway so Badly Covered that Plaintiff Fell Through and Broke his Leg.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was the possessor and occupier of a certain dwelling-house and premises, with the appurtenances, situate in the city of, in county, and near to a certain common or public street, known as street, in said city, in which street on the side-walk on the side

thereof there was, on the day aforesaid, a certain hole opening into a cellar of and belonging to said dwelling-house and premises of defendant.

2. The defendant, well knowing the premises, on the day and year aforesaid wrongfully and negligently permitted the said hole to be and continue insufficiently and defectively covered; that by means of the premises, and for want of a proper and sufficient covering to said hole, the plaintiff was then and there passing along said public street and upon the said sidewalk thereof, then and there, without fault on his part, unavoidably slipped and fell into said hole, and thereby the left leg of the plaintiff was fractured and broken, and the plaintiff was sick and lame in consequence thereof, and prevented from attending to his lawful business for the space of ... months, and was obliged to pay out and expend the sum of \$..... for medical services and attendance while endeavoring to be cured of said wounds, to the damage of plaintiff in the sum of \$.....

No. 222.

For Permitting Water to Flow from Roof of Defendant's Building on to Plaintiff's Premises.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, possessed of and occupies a certain dwelling situate on lot, in block, in the city of, in county.

2. On the day and year aforesaid the defendant wrongfully and unjustly erected a building near said premises of plaintiff in so careless and negligent a manner that large quantities of rain water on the day and year aforesaid, and on other days since that time, flowed from said building upon the premises of plaintiff, thereby [*state the injury*], to the plaintiff's damage in the sum of \$.....

No. 223.

Obstructing Street.

1. The plaintiff complains of the defendant for that on the day of, 18..., there was and from thence hitherto has been a public street and highway in the of, in county, called street.

2. The defendant, well knowing the premises, on or about the day of, 18..., wrongfully placed large quantities of brick and other materials in said street, and permitted the same to remain there without taking proper precautions to prevent accidents thereby, in consequence of which said plaintiff, while passing along said street in the night time, in a carriage belonging to plaintiff, was, without fault or negligence on his part, driven against said brick and other materials, and said carriage was thereby overturned and broken, and the plaintiff thrown out and [*state injuries if any*], whereby the plaintiff was compelled to pay the sum of \$..... for medical services and medicines in being cured of his injury, and was unable to attend to his business for the space of months, and was compelled to pay for repairing said carriage the sum of \$....., in all to the plaintiff's damage in the premises in the sum of \$.....

No. 224.

*Against Contractor for Leaving Trench in Street Open and Unguarded.*¹

1. The plaintiff complains of the defendant for that on the day of, 18..., street in the city of, in county, was and still is a common highway.

2. On said day the defendant entered into a contract with the proper authorities to lay down certain water [*or gas*] pipes therein, and to keep said street in a reasonably secure condition while performing said labor, and thereupon the defendant dug a trench in said street about feet in width and feet deep for the reception of said pipe, and wrongfully left the same open during the night time without any guard, light, or signal to indicate the existence of such trench, and without any proper precautions against accident.

3. On the day of, 18..., the plaintiff, while lawfully driving along said street in the night time, without any warning or knowledge of the existence of said trench, and without any fault on his part, drove into said trench, and his carriage was overturned and broken and [*state the personal injuries*].

[*State damages as in preceding form.*]

¹See next form.

No. 225.

Against Lot Owner for Extending Cellar into Sidewalk and Leaving the Same Unguarded.

1. The plaintiff complains of the defendant for that said defendant was on the day of, 18..., possessed of lot, in block, situate on street, in the city of, in county.

2. Said street at the time aforesaid was and still is a common highway and open for the use of the public.

3. On said day said defendant did, by his agents and employees, dig a [cellar] to the depth of feet upon said lot and extended the same into the sidewalk of said street, and wrongfully and negligently permitted the same to remain open, uncovered, and unguarded, and without any proper precautions to prevent accidents by falling into the same, in consequence of which said plaintiff, while passing along said street in the night time, without any fault on his part, fell into said cellar and was thereby [state injuries], to the plaintiff's damage in the sum of \$.....¹

No. 226.

For Obstructing a Highway.

1. The plaintiff complains of the defendant for that on the day of, 18..., there was, and from thence hitherto has been and still is, a public highway leading from to, running along the line of section No., in township, in range, in county, which was free to every one to pass and repass at pleasure.

2. At the time aforesaid the plaintiff was lawfully possessed of teams and wagons, and was conducting the same along said highway to

3. The defendant on said day, well knowing the premises, wrongfully and unlawfully built a fence across said highway, on the line of said section, and obstructed the same, and has kept said highway closed from thence until, and thereby prevented the plaintiff from conducting said wagons along said

¹ The above is the substance of the petition in *Palmer v. The City of Lincoln*, 5 Neb., 135.

highway, by reason of all which the plaintiff was compelled to conduct said wagons back again, and by a very circuitous road, and for a much greater distance, to-wit: miles, than he otherwise would and of right ought to have done, to his damage in the sum of \$.....

As to what facts will authorize an injunction in restraining a public nuisance upon a public highway, see *Shed v. Hawthorne*, 3 Neb., 179.

No. 227.

For Diverting Water from Plaintiff's Mill.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was and from thence hitherto and still is, lawfully possessed of a mill situate on creek, in county, and was and is lawfully entitled to the water of said stream for the purpose of running the wheels and machinery of said mill.

2. The defendant, well knowing the premises, on said day and divers other days between that time and the commencement of this action, wrongfully and unlawfully cut a ditch out of the side of said stream above said mill and extended the same to, and thereby diverted the water of said creek from said mill, by reason of which there is not sufficient water left in the channel of said creek to operate said mill, whereby the plaintiff has lost the use and enjoyment of the same for the space of months, to his damage in the sum of \$.....

If the diversion is only partial, state the capacity of the mill before the diversion and its capacity since.

No. 228.

Obstruction from Back Water.

1. [*As in preceding form.*]

2. The plaintiff is entitled to the free and unobstructed flow of said water in the channel of said creek below said mill, yet said defendant, on or about the day of, 18..., erected a dam across the bed of said creek, about miles below said mill of plaintiff, and has since maintained the same, and has thereby raised the water in the bed of said creek, and caused it to flow back upon the water-wheels of said mill to the depth of

..... feet, thereby obstructing the natural flow of water therefrom, and diminishing in a great degree the power, capacity, and value of said mill, to plaintiff's damage in the sum of \$.....

No. 229.

Obstructing Ford.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, possessed of the following described lands, viz.: [*describe lands*], through which a stream of water, known as, flows in its natural channel, and across which the plaintiff had a ford to enable him to pass and repass said stream to and from said land situate on either side thereof.

2. On the day of, 18..., the defendant, well knowing the premises, erected a dam across said stream about mile below said land of plaintiff, and has since maintained the same, and has thereby raised the water in the channel of said creek upon plaintiff's land at that place feet, and rendered it unsafe to pass said ford [*state special damages*], whereby the use of the same is lost to plaintiff, to his damage in the sum of \$.....

No. 230.

Waste. Landlord v. Tenant.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff leased to the defendant the following described premises, viz.: [*describe premises*], for the term of years.

2. On or about the day of, 18..., the defendant entered upon and still occupies said premises under said lease; that at divers times between the date of said entry and the commencement of this action the defendant spoiled and wasted said premises by [*state specifically the acts complained of*], whereby the plaintiff has sustained damages in the sum of \$.....

Waste is defined to be a spoil or destruction in houses, lands, or tenements, to the damage of him who is in reversion or remainder. 2 Black. Com., 281. Taylor's Landlord and Tenant, § 345. No woman who is endowed of any lands shall commit or suffer any waste on the same, but shall maintain the

houses and tenements, with the fences and appurtenances, in good repair, and shall be liable to the person having the next immediate inheritance therein for all damages committed or suffered by her. G. S., page 279.

An executor or administrator shall also be liable as for waste in case of neglect to sell property or to pay over money in his hands if loss has been sustained. Id., 331.

No. 231.

By Heirs v. Doweress for Waste.

1. The plaintiffs complain of the defendant for that one C. D. in his lifetime was seized in fee of the following described lands, viz.: [*describe them*].

2. On the day of, 18..., being so seized of said lands, said C. D. died intestate, leaving E. F., the defendant herein, his widow, who thereupon possessed as her dower for life one part of said lands, viz.: [*describe lands assigned*].

3. The plaintiffs are the only children and heirs of said C. D., and from the time of his death until the present time have been and now are entitled to the reversion in said premises.

4. The defendant, with intent to injure the plaintiffs in their reversionary interests in said premises, on or about the day of, 18..., and on divers other days since that time and before the commencement of this action, wrongfully and without authority cut down and carried away from said premises trees, of the value of \$.....

5. The plaintiffs have thereby sustained damages to their reversionary estate in said premises in the sum of \$.....

No. 232.

Trespass to Dwelling-House.

1. The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that time and the commencement of the action, the defendant unlawfully and with force broke and entered a certain dwelling-house of the plaintiff's, situate upon lot ..., in block ..., in the city of, in county, and then and there made a great noise and disturbance therein, and stayed and continued to make

such noise and disturbance for hours then next following, and then and there forced and broke open, and broke to pieces [*describe the property damaged or destroyed*], of the value of \$.....

2. By means of which said several premises said plaintiff and his family were, during all the time aforesaid, greatly disturbed, and the plaintiff was prevented from carrying on and transacting his lawful and necessary affairs and business, to his damage in the sum of \$.....¹

No. 233.

For Expulsion.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant unlawfully and with force broke and entered a certain dwelling-house of the plaintiff, situate on, in county, and then and there ejected and expelled the plaintiff and his family from the possession, use, and occupation of the same, and has kept them so ejected until the present time.

2. Whereby the plaintiff during all of said time was deprived of the use and benefit of said dwelling house, to his damage in the sum of \$.....

No. 234.

For Digging in a Coal Mine.

1. The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that time and the commencement of the action, the defendant unlawfully and with force broke and entered a certain coal mine or vein of coal of the plaintiff, situate [*on the quarter of section ... , in township ... north, of range, in county*], and then and there dug out of and carried away from the same tons of coal of the said plaintiff of the value of \$....., and converted and disposed of the same to his own use, to the plaintiff's damage in the sum of \$.....

¹ In trespass *quare clausum* possession is all that is necessary to maintain the action; it is therefore unnecessary to set out the plaintiff's title. At common law it does not appear to have been necessary to describe the premises, but under the code it seems to be necessary, otherwise the petition would be subject to a motion to make definite and certain.

No. 235.

For Piling Wood or Other Material on the Land of Another without License.

1. The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that time and the commencement of this action, the defendant unlawfully and with force broke and entered upon the plaintiff's land, described as follows, viz.: [*describe premises*], and there placed and laid [*describe material, thus: fifty cords of wood*] upon said land, and kept the same there without the leave or license and against the will of plaintiff for months.

2. Thereby during said time greatly incumbered said land and prevented the plaintiff from having the use and benefit of the same, to his damage in the sum of \$.....

No. 236.

For Fishing in Plaintiff's Close Covered with Water.

The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that day and the commencement of this action, the defendant unlawfully and with force entered the close of the plaintiff, covered with water, situate as follows, viz.: [*the quarter of the quarter*] of section ..., in township ..., range ..., in county, and then and there fished in the said close for fish, and the fish, to-wit: pike, carp, perch, etc., of the plaintiff, of the value of \$....., were then and there caught by said defendant and by him carried away and converted to his own use, to plaintiff's damage in the sum of \$.....

No. 237.

For Cutting Down and Carrying Away Trees.

The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that day and the commencement of this action, the defendant, unlawfully and with force, broke and entered upon the plaintiff's land, described as follows, viz.: the [*..... quarter of section ..., in township ..., range ...*], in county, and then and there cut down ten white oak, five black walnut, and ten whitewood trees belonging to plaintiff, and then growing on said land, and of

the value of \$....., and carried the same away and converted them to his own use, to the plaintiff's damage in the sum of \$.....

No. 238.

Damage from Stock.

The plaintiff complains of the defendant for that on the day of, 18..., and on divers other days between that day and the commencement of this action, the defendant, unlawfully and with force, broke and entered upon the plaintiff's land, viz.: [*describe premises*], and then and there with horses, cattle, and sheep trod down, eat up, and destroyed acres of wheat, acres of corn, and acres of grass growing thereon, and belonging to plaintiff, of the value of \$....., and converted and disposed of the same to his own use, to plaintiff's damage in the sum of \$.....

No. 239.

For Mesne Profits.

1. The plaintiff complains of the defendant for that on the [*date of entry*] the defendant, unlawfully and with force, broke and entered upon the plaintiff's land, described as follows, viz.: [*describe premises in full*], and ejected and expelled the plaintiff from his possession and occupation thereof, and kept and continued him so expelled until [*the day possession was regained*], and during that time took and received to his own use all the issues and profits of said real estate, being of the yearly value of \$.....

2. Whereby the plaintiff during all of said time lost the issues and profits of said premises, to his damage in the sum of \$.....

An action for mesne profits will be barred in four years.

No. 240.

For Carelessly Setting out Fire.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was and still is possessed of the following described premises, viz.: the quarter of section ..., in township ... north, range ..., in county, on which there were stacks of wheat, containing bushels

thereof, and acres of timber, all being the property of plaintiff, and of the value of \$.....

2. The defendant, well knowing the premises, on said day intentionally kindled a fire on or near the [*describe land*], at about the distance of mile from said premises, and through carelessness and neglect in not properly watching and tending the same said fire spread on to said land of plaintiff and consumed said wheat, being of the value of \$....., and destroyed one-half of said timber, to the damage of plaintiff in the sum of \$.....

Where the fire spreads from the place where it was set out until it reaches the property destroyed, the burning being continuous, the destruction of the property is the direct and natural result of setting the fire, and renders the person setting the same liable for the damages. *B. & M. R. R. v. Westover*, 4 Neb., 275-6. *Clemmens v. H. & St. Joe R. R.*, 53 Mo., 366. *Kellogg v. C. & N. W. R. R.*, 26 Wis., 230. *A., T. and Santa Fe R. R. v. Stamford*, 12 Kans., 354.

No. 241.

For Entering Upon Land and Removing Fence.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, unlawfully and with force, broke and entered upon the plaintiff's land, described as follows: [*describe premises*], and took down a fence belonging to plaintiff standing upon said land, of the value of \$....., and carried the same away and converted it to his own use, and thereby prevented the plaintiff from enjoying the possession of said land. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 242.

For Running a Carriage Against the Carriage of Plaintiff.

The plaintiff complains of the defendant for that on the day of, 18..., the defendant carelessly, improperly, and with force, drove a certain carriage, to-wit: a, which he was then driving along the public highway, against a certain other carriage, to-wit: a, of the said plaintiff, of the value of \$....., in which the plaintiff was then riding along said pub-

lic highway, and thereby then and there said plaintiff, without fault on his part, was thrown with great force and violence out of his said upon the ground and [*state injuries*], and was thereby unable to perform his lawful business for the space of months, and was forced to expend the sum of \$..... for medical services, medicines, and attendance in endeavoring to be cured of said wounds, and also necessarily expended the sum of \$..... in repairing the damage done to said as aforesaid, to the plaintiff's damage in the premises in the sum of \$.....

The above is the substance of the declaration for careless driving in 2 Chitty Pl., 860.

No. 243.

The Same.

1. The plaintiff complains of the defendant for that on the day of 18..., the plaintiff was lawfully in possession of a carriage, to-wit: a, and a horse drawing the same, in which carriage the plaintiff was riding along a public highway, and the defendant was then in possession of a carriage, to-wit: a, and of a span of horses under his control, drawing the same on said highway.

2. The defendant then and there carelessly and negligently so directed his horses and that they struck the horse and of plaintiff with great force and violence, and thereby then and there, without fault on the part of plaintiff, threw him with great force and violence out of his said upon the ground and [*state injuries*], and he was thereby unable to perform his lawful business for the space of months.

[*Continue as in preceding form.*]

No. 244.

For Running Against Plaintiff's Horse and Killing It.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant carelessly, improperly, and with force drove a certain wagon then in his care and control against a certain horse of the plaintiff, of the value of \$....., and thereby ran the tongue of said wagon into the side of said horse and wounded the same, by reason whereof said horse, on

the day of, 18..., died, to the plaintiff's damage in the sum of \$.....

The above is the substance of the declaration in 2 Chitty Pl., 860.

No. 245.

For Driving a Carriage over Plaintiff.

The plaintiff complains of the defendant for that on the day of, 18..., the defendant negligently, carelessly, and with force, drove a certain wagon then in his care and control, against and over the plaintiff, without fault on the part of plaintiff, whereby [*state the injuries received*], and was forced to expend the sum of \$..... for medical services, medicines, and attendance in endeavoring to be cured of said wounds, and was prevented from following his lawful business for the space of weeks, to the plaintiff's damage in the sum of \$.....

No. 246.

For Conversion of Chattels.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was the owner and in possession [*if not in possession say entitled to the immediate possession*] of the following described goods and chattels, viz.: [*describe them*], of the value of \$.....

2. On the day aforesaid the defendant obtained possession of said goods and chattels, and unlawfully and wrongfully converted them to his own use, to the damage of the plaintiff in the sum of \$.....

No. 247.

By Administrator v. Party for Conversion.

1. The plaintiff complains of the defendant for that on the day of, 18..., one A. B. was the owner and in possession of the following described goods and chattels, viz.: [*describe them*], of the value of \$.....

2. On the day of, 18..., the defendant obtained possession of said goods and chattels and unlawfully and wrongfully converted the same to his own use, to the damage of the said A. B. in the sum of \$....., no part of which has been paid.

3. On the day of, 18..., said A. B. died intestate,

and on the day of, 18..., letters of administration upon his estate were duly issued to the plaintiff by the county judge of county, and the plaintiff thereupon duly qualified as such administrator and entered upon the duties of said office, and is now administrator of said estate.

No. 248.

By Assignee After Conversion.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned one C. D. was lawfully possessed of the following described goods and chattels [*describe them*].

2. On the day of, 18..., the defendant obtained possession of said goods and chattels, and unlawfully converted the same to his own use.

3. On the day of, 18..., said C. D. duly assigned to the plaintiff all his claim and demand against the defendant for said conversion and damages.

No. 249.

For Conversion of a Note or Bond by Assignee After Conversion.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., one C. D. was the owner of a promissory note [*or bond*], of which the following is a copy:
[*Copy instrument.*]

2. On said day C. D., at defendant's request, delivered the same to him upon an agreement between them, that on ascertaining what it could be sold for he would either buy it and pay said C. D. the value thereof, or would return the same to him on demand.

3. On the day of, 18..., and after said defendant had had possession of said a sufficient length of time to ascertain the value thereof, said C. D. demanded from the defendant said or its value, but the defendant, while admitting that said was in his possession, refused to return it or pay the value thereof.

4. The value of said was the sum of \$.....

[*Copy paragraph 3 in preceding form.*]

No. 250.

Replevin.

1. The plaintiff complains of the defendant for that the plaintiff is the owner and entitled to the immediate possession of the following described goods and chattels, viz.: [*describe them*], of the value of \$.....

2. The defendant wrongfully detains said goods and chattels from the possession of plaintiff, and has wrongfully detained the same for days, to plaintiff's damage in the sum of \$.....

3. The plaintiff therefore prays judgment against the defendant for a return of said goods and chattels, or for the value thereof if the same are not returned, and for his damages and costs.

No. 251.

Replevin, where Plaintiff has a Special Ownership in the Goods.

1. The plaintiff complains of the defendant for that the plaintiff has a special property in the following described goods and chattels, to-wit: [*a two-horse combined reaper and mower, patent*], as follows: on the day of, 18..., the plaintiff hired said machine from C. D., the owner thereof, and then duly paid him the sum of \$..... for the use of the same for the period of months from that date, and is entitled to the immediate possession of said machine.

2. The defendant wrongfully detains said goods and chattels, etc.

[*As in preceding form.*]

No. 252.

Against Innkeeper for Loss of Trunk.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was, and from thence hitherto and still is, the keeper of a common inn in the city of, in county, known as "The,," for the reception, lodging, and entertainment of travelers.

2. On the day aforesaid the plaintiff, with a trunk containing [*describe the property lost*], was then and there received into said inn as a traveler by said defendant.

3. While said plaintiff was so remaining at said inn said

trunk, with its contents, was taken and carried away from said inn without plaintiff's knowledge or consent, by some person to him unknown, whereby the same is lost, to plaintiff's damage in the sum of \$.....

No. 253.

Against Innkeeper for Refusing to Lodge Plaintiff.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was the keeper of a common inn in the of in county, known as "The", for the reception, lodging, and entertainment of travelers.

2. The plaintiff then and there, being a traveler, came and was received by said defendant into said inn, and then and there required the defendant to permit the plaintiff to stay and lodge at said inn during the night of the same day, and the plaintiff then and there offered to pay the defendant a reasonable sum of money for such lodging.

3. The defendant, although having sufficient room in the inn, refused to permit plaintiff to stay or lodge therein during the time aforesaid. Whereby he was forced to quit said inn and travel in the night time miles in order to procure lodging elsewhere, and was otherwise greatly injured, to his damage in the sum of \$.....

No. 254.

*For Falsely Representing a Third Person Fit to be Trusted.*¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was, and from thence hitherto and still is, engaged in the business of

2. On said day one E. F. applied to the plaintiff and requested him to sell goods on credit to the said E. F., in the way of plaintiff's said business.

3. The plaintiff, being unacquainted with the character and circumstances of said E. F., was then and there referred by him to the defendant for information respecting the same, whereof

¹ The petition in this case is in substance the declaration in 2 Chitty Pl., 703.

the defendant afterwards had notice from one G. H., the servant of the plaintiff, and the said defendant was then and there interrogated by said G. H., on the part of the plaintiff, respecting the character and circumstances of said E. F.

4. The defendant, well knowing the premises, and that said E. F. was then in bad and insolvent circumstances, and unfit to be trusted for goods on credit, on the day of, 18..., falsely and fraudulently, in answer to certain questions then and there put to said defendant by said G. H., on the part of the said plaintiff, respecting the character and circumstances of the said E. F., represented and affirmed: [*here set forth the misrepresentations, as thus:*] The defendant knew the said E. F., and had done a deal of business with him, and had taken considerable of E. F.'s money, and that the defendant then did business with the said E. F., and that upon the whole the defendant believed the said E. F. to be a good man [*thereby then and there meaning that the said defendant believed the said E. F. to be a man in good circumstances and fit to be trusted with goods on credit*].

4. In consequence of said representation and affirmation so made by said defendant to said G. H., and the plaintiff, not knowing to the contrary, but believing therefrom that said E. F. was a man in good circumstances and fit to be trusted, afterwards, on the day of, 18..., and on divers other days between that time and the day of, 18..., was induced to give credit to said E. F., and did then sell and deliver to him divers goods on credit, to the amount of \$....., whereas in truth and in fact [*here negative the truth of defendant's representations, thus:*] the said E. F., at the time the said defendant made the representation and affirmation to the said G. H., as aforesaid, was in bad and insolvent circumstances, and not fit to be trusted for goods on credit; and in fact the said defendant did not at that time do business with said E. F., and the defendant did not believe the said E. F. to be a good man, but on the contrary at that time well knew the said E. F. was then in bad and insolvent circumstances, and not fit to be trusted with goods on credit. The price of said goods is still wholly due and unpaid to plaintiff, and he is likely wholly to lose the same, to his damage in the sum of \$.....

No. 255.

For False Representations to a Purchaser as to the Amount of Business, Etc.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant was possessed [*state character of title*] of a certain public-house in the town of, in county, known by the name of "The, " and carried on therein the business of an innkeeper and dealer in wines and spirits.

2. Said defendant, being desirous of selling said property and business and the good-will of the same, falsely and fraudulently represented to the plaintiff that [*state the misrepresentations as near as possible in the words used, thus:*] the said public-house was then selling between seven and eight butts per month, amounting to about the sum of \$....., etc.

3. The plaintiff, confiding in said representations of defendant, purchased said premises and the good-will thereof for the sum of \$....., and the household furniture, fixtures, utensils, and effects then upon the premises for the further sum of \$....., which sums of money were then and there duly paid.

4. The business of said public-house was not before nor at the time of making said false representations between seven and eight butts per month, but had been and was but one butt per month, and did not exceed the sum of \$....., etc., as said defendant at the time of making said false representations well knew; and the principal business of said public-house is and was the sale of wines and spirits.

5. Said premises and good-will are of but little value, and the plaintiff has sustained damages in the premises in the sum of \$.....

No. 256.

For Deceit in the Exchange of Property.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, being possessed of a certain horse of the value of \$....., and the defendant being possessed of a certain horse, they entered into an agreement to exchange horses upon the following terms, viz.: the plaintiff to deliver to defendant his said horse and the sum of \$..... for the horse of the defendant.

2. The defendant, to induce plaintiff to make said exchange, falsely and knowingly represented to the plaintiff that said horse of defendant was [sound] [state the representation] so far as he knew, said defendant well knowing that said horse was not [sound].

3. The plaintiff, relying upon said representations, then exchanged horses with the defendant upon the terms aforesaid, and paid the defendant said money.

4. At the time of said exchange said horse of the defendant was not [sound], but on the contrary then was and still is unsound, and has become of little [or no] value to the plaintiff, to his damage in the sum of \$.....

No. 257.

Deceit in the Sale of a Horse.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, bargained with said defendant to buy of him a certain horse, for the sum of \$.....

2. Said defendant, to induce plaintiff to purchase said horse for said sum, falsely and fraudulently represented that said horse, so far as he knew, was sound, etc., and the plaintiff, relying upon said representations of the defendant, did then purchase said horse of him for said sum of \$....., then duly paid.

3. Said horse, at the time of making said representations and sale, was not sound, as the defendant well knew, but [state in what particulars the representations were false], and said defendant falsely and fraudulently deceived said plaintiff in the sale of the same [state special damages, if any], to the damage of plaintiff in the sum of \$.....

No. 258.

For Selling Goods as of One Quality which were of Another.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, bargained with said defendant to buy of him one thousand sacks, of ninety-eight pounds each, of flour, for the sum of \$.....

2. Said defendant, to induce plaintiff to purchase said flour

for said sum, falsely and fraudulently represented said flour to be of the best quality of winter wheat flour, and the plaintiff, relying upon said representations of the defendant, thereupon purchased said flour for the said sum of \$.....

3. Said flour was not the best quality of winter wheat flour as was falsely represented by the defendant, but was made from an inferior variety of spring wheat, and is of but little value, of all which the defendant then well knew, but falsely and fraudulently deceived plaintiff in the sale thereof, to his damage in the sum of \$.....

No. 259.

For Falsely Representing and Selling a Tract of Land for More than was in it.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, bargained with said defendant to buy of him a piece of land situate in, in county, for the sum of \$....., which piece of land the defendant falsely represented to contain acres.

2. The plaintiff, relying upon said representations of defendant, and believing that said piece of land contained acres, purchased the same, and then and there paid the defendant therefor the said sum of \$.....

3. Said piece of land did not contain acres, but only acres, all which the defendant well knew at the time of making said false representations and sale.

4. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 260.

For Fraudulently Delivering a Smaller Quantity than Pretended.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, at defendant's request, bargained with said defendant to buy of him one hundred tons of coal, for the price of \$..... per ton.

2. On the day and year aforesaid said defendant, intending to defraud the plaintiff, did fraudulently and deceitfully deliver to plaintiff only ninety tons of coal for said quantity of one hundred tons.

3. Said coal is deficient in quantity ten tons, as the defendant then well knew. The plaintiff has sustained damages in the sum of \$.....

No. 261.

For Selling Liquids by Short Measure.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff purchased from the defendant five hundred gallons of for the price of \$..... per gallon.

2. On the day aforesaid the defendant delivered to the plaintiff a quantity of said under said contract, and falsely and fraudulently represented to the defendant that the same contained five hundred gallons, when in fact said defendant delivered but four hundred gallons, as he well knew.

3. Said is deficient in quantity one hundred gallons, to the damage of plaintiff in the sum of \$.....

No. 262.

Escapes.

1. The plaintiff complains of the defendant for that on the day of, 18..., one E. F. being indebted to the plaintiff in the sum of \$....., the plaintiff commenced an action against said E. F. in the district court of county for the recovery of said sum of \$.....

2. On said day the plaintiff sued out of the clerk's office of said district court an order of arrest in due form, directed to the sheriff of county, and requiring said sheriff to arrest said E. F. [*recite order of arrest*], which order of arrest, together with a copy of the affidavit upon which the same was issued, were on the day of, 18..., delivered to the defendant, who was the sheriff of county, to be by him duly executed.

3. On the day of, 18..., said defendant arrested said E. F., and then as such sheriff had him in custody under said order of arrest, and on the day of, 18..., without the license or consent of plaintiff, and without any portion of the said debt of plaintiff against said E. F. being paid, permitted said E. F. to escape out of his custody, and to go at large.

4. Whereby the said E. F. has gone beyond the reach of the

process of this court, with all his money and effects, and the plaintiff has wholly lost his said claim against him, to the damage of the plaintiff in the sum of \$.....

No. 263.

For not Arresting Debtor, and Making False Return.

1 and 2. [*As in preceding form.*]

3. Said E. F., at the time of the delivery of said order of arrest to said defendant, and from that time until the return of the same, was within county and might have been taken and arrested by said defendant under said order.

4. The defendant wholly neglected his duty in that regard, and did not and would not arrest the said E. F., but wholly failed therein.

5. Said defendant, also being the sheriff of said county, at the return of said order of arrest falsely and deceitfully returned upon said order to said district court that the said E. F. was not found in county, and the said E. F. did not appear in said court at the return of said order, nor has he appeared at any other time therein or given bail for his appearance.

6. By reason of the premises the plaintiff has been deprived of the means of recovering said claim against said E. F., and has wholly lost the same, to his damage in the sum of \$.....

No. 264.

For False Return to an Execution.

1. The plaintiff complains of the defendant for that at the term, 18..., of the district court of county, the plaintiff recovered a judgment against one G. H. for the sum of \$....., and \$..... costs of suit, which judgment still remains in full force, and no part of which has been paid.

2. On the day of, 18..., an execution in due form was, at the request of the plaintiff, issued on said judgment, directed to the sheriff of county, commanding said sheriff [*recite the command of the execution*], which execution on the day aforesaid was delivered to the defendant, who was the sheriff of county, and who as such sheriff levied said execution upon certain goods and chattels of said G. H., of the value of \$....., * but refused to sell the same, and on the day

of, 18..., released said levy, and on the return day of said writ, he, still being sheriff of county, made a return to said writ that said G. H. had no goods or chattels, lands or tenements in said county whereon to levy said execution, whereas the goods and chattels levied upon by defendant as aforesaid were the property of said G. H., and were of sufficient value to satisfy the amount due on said writ.

3. By reason of the premises the plaintiff has lost the amount of said judgment, to his damage in the sum of \$.....

No. 265.

For Neglecting to Pay Over Moneys Collected on Execution.

1. [*As in preceding form.*]

2. On the day of, 18..., an execution in due form was, at the request of the plaintiff, issued on said judgment, directed to the sheriff of county, commanding said sheriff [*recite the command of the execution and date of return*], which execution was on the day aforesaid delivered to the defendant, who was the sheriff of said county.

3. The defendant thereupon, as such sheriff, collected upon said execution the sum of \$....., besides his lawful fees.

4. The defendant, in violation of his duty, has failed to pay to the clerk of said court, or to the plaintiff, the amount collected on said execution, or any part thereof, although more than [*sixty*] days have elapsed since the delivery to him of said execution.

5. There is now due from the defendant to the plaintiff thereon the sum of \$....., with interest from the day of, 18...

No. 266.

For Neglecting to Return Execution.

1. [*As in form No. 264.*]

2. [*As in preceding form.*]

3. The defendant, in violation of his duty as such sheriff, has failed to return said execution although more than sixty days have elapsed since the delivery of said execution to him before the commencement of this action, to the damage of the plaintiff in the sum of \$.....¹

¹ See *Ledyard v. Jones*, 7 N. Y., 550.

No. 267.

For Leaving Property Levied on with Debtor whereby it was Lost.

1. [Follow form No. 264 to the *, then say:]

2. The following is a description of said goods and chattels: [describe them], which the defendant left in the custody of said G. H., and thereupon advertised said goods and chattels for sale under said execution at, on the day of, 18..., but said debtor did not produce said property at the time set for said sale, and the same could not be found, and was not sold by said defendant, and the said G. H. has no other property whereon to levy said execution.

3. Therefore the plaintiff is unable to collect said judgment and costs against said G. H., and the amount due thereon is wholly lost, to the damage of the plaintiff in the sum of \$.....

No. 268.

Against a Plaintiff for Causing an Execution to be Issued and Levied on a Judgment which was Satisfied.

1. The plaintiff complains of the defendant for that at the term, 18..., of the district court of county, the defendant recovered a judgment against the plaintiff for the sum of \$....., and \$..... costs of suit, which judgment and costs the plaintiff, on or about the day of, 18..., fully paid to the defendant.

2. On the day of, 18..., said defendant, well knowing that said judgment and costs had been fully paid, and that there was nothing due thereon, unlawfully caused an execution for the sum of \$..... to be issued on said judgment, and delivered to the sheriff of said county, and required said sheriff to levy said execution upon the goods and chattels, lands and tenements of the plaintiff, and collect therefrom the sum of \$.....

3. Said sheriff levied such execution upon property of plaintiff of the value of \$....., and sold the same under said execution for a price far below the real value thereof. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 269.

For Selling Property Exempt from Execution.

1. The plaintiff complains of the defendant for that at the term, 18..., of the district court of county, one recovered a judgment against the plaintiff for the sum of \$....., and \$..... costs of suit.

2. On the day of, 18..., said caused an execution to be issued on said judgment directed to the sheriff of county, commanding said sheriff to make said sum of \$..... and costs out of the goods and chattels, or for want thereof of the lands and tenements of the plaintiff, which execution was delivered to the defendant, he being the sheriff of said county, and was by him on the day of, 18..., levied upon the following described property of the plaintiff [*describe property*], which property was exempt from execution.

3. The plaintiff, at the time said execution was issued, was and now is a resident of this state, the head of a family, and having neither lands, town lots, nor houses subject to exemption as a homestead, filed an inventory under oath of the whole of the personal property owned by him, with said defendant before the sale of said property, and claimed the same as exempt, but said defendant refused to call to his assistance three disinterested freeholders of the county and appraise said property, but sold said property under said execution, and applied the proceeds thereon, to the damage of plaintiff in the sum of \$.....

No. 270.

By Mortgagee of Goods v. Sheriff for Selling them on Execution against the Mortgagor.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff loaned to one the sum of \$....., due in months from that date, and to secure the payment of the same said executed and delivered to plaintiff a chattel mortgage upon the following described goods and chattels [*describe them*].

2. Said mortgage [*or a true copy thereof*] was duly filed in the office of the county clerk of county, on the day of, 18...

3. The sum secured by said mortgage was not paid at the

time the same became due, nor has it yet been paid, and on the day of, 18..., the plaintiff requested said to pay the same, which he failed to do, and thereupon the plaintiff, by the condition of said mortgage, became the owner, and entitled to the immediate possession of said property.

4. On or about the day of, 18..., the defendant, then being sheriff of county, under an execution issued against the property of said [*mortgagor*], levied upon the above described mortgaged property, although having full knowledge of the plaintiff's rights therein, and that the amount secured by said mortgage had not been paid, and on or about the day of, 18..., sold the entire interest in said goods and chattels without regard to said mortgage, and applied the proceeds thereof upon said execution.

5. The plaintiff since said sale has demanded of said defendant said goods, but he then refused and still refuses to deliver the same, to the damage of the plaintiff in the sum of \$.....

No. 271.

Against School District Board for Refusing to Permit Plaintiff's Children to Attend School.

1. The plaintiff complains of the defendant for that school district No. of county is duly organized under the laws of this state, and a public school has been taught therein supported by the common school fund of the state for years last past.

2. On the day of, 18..., said defendants constituted the school district board of said district, and as such board employed a teacher on behalf of said district, who at the time aforesaid was teaching the school therein, his wages being paid out of said common school fund.

3. On the day aforesaid the plaintiff was a resident of said district, and was the father of the following named children, who resided with him in said district, to-wit: [*give names*]; that said children were over the age of five years and under the age of twenty-one years, and were of right entitled to the privileges of said school, yet on the day aforesaid said defendants wrongfully and unjustly kept out and excluded said children from said

school, and still refuse to permit them to attend the same, to the damage of the plaintiff in the sum of \$.....

No. 272.

Against Judges of an Election for the Rejection of Plaintiff's Vote.

1. The plaintiff complains of the defendant for that at the general election held in precinct, in county, on the day of November, 18..., for the purpose of electing, said defendants were the judges of election, and opened the polls of said election in said precinct at the time and place required by law.

2. The plaintiff, on the day aforesaid, was a citizen of the United States, and of this state, and a resident and legal voter at said election in said precinct.

3. The plaintiff, on the day aforesaid, and while said polls were still open for the reception of votes, offered his vote for the election of, being offices to be filled at said election, to said defendants as such judges of election, but they refused to receive the same.

4. By reason of which the plaintiff was prevented from voting at said election, and thereby was deprived of his said right, to his damage in the sum of \$.....

No. 273.

Against Witness for Neglecting to Attend, or Refusing to Produce Papers, etc.

1. The plaintiff complains of the defendant for that said defendant, being a resident of county, on said day was duly served with a subpoena issued out of the court of said county at the instance of the plaintiff, requiring said defendant to appear in said court on the day of, 18..., [and to bring with him his book of original entry of accounts] and to give testimony on behalf of the plaintiff in an action pending therein in which the plaintiff herein was plaintiff and one defendant.

2. The defendant herein was a material witness for plaintiff on the trial of said cause without whose evidence he could not safely proceed to trial.

3. Said defendant, without any just or reasonable excuse, failed and neglected to appear at said trial as required by said subpœna, but willfully absented himself therefrom; wherefore by reason of said absence of defendant, the plaintiff was compelled to move for a continuance of said cause, which was granted by said court upon the payment by the plaintiff of costs of suit to date, amounting to the sum of \$....., which sum was paid by plaintiff, and said cause continued. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 274.

Against Surgeon for unskilfulness.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was a physician and surgeon.

2. On said day the plaintiff broke and fractured the bones of his left arm below the elbow, and thereupon the plaintiff, at defendant's request, employed said defendant as a surgeon for a certain reward to set the broken bones of said arm in their proper position and place, and to attend upon the plaintiff until he should be healed of said injury.

3. Said defendant thereupon set said bones and reduced said fracture, but did the same so carelessly, negligently, and unskilfully, and so unskilfully and negligently dressed and bandaged the same that by reason thereof [*state particular defect*].

4. Whereby the plaintiff has been greatly injured and is unable to attend to his ordinary business, and has necessarily incurred great expense, to-wit: the sum of \$..... in endeavoring to be cured of said defect, to the damage of the plaintiff in the sum of \$.....

No. 275.

Against Physician for Unskilfulness and Neglect.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant was a physician, and on said day the plaintiff being sick, at the request of the defendant, employed him as such physician, for reward, to attend upon and care for the plaintiff.

2. The defendant then entered upon such employment, but

[state the want of ordinary care or skill upon the part of the defendant by which the plaintiff was injured], whereby the plaintiff was unable to attend to his ordinary business for the space of..... months, and has been greatly injured in his health, and has necessarily expended the sum of \$..... in endeavoring to be cured of said illness, the same being aggravated and prolonged by said unskilfulness and negligence of defendant, to the damage of the plaintiff in the sum of \$.....

No. 276.

For Wrongfully Chasing Sheep or Cattle whereby they were Injured.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant unlawfully drove and chased [one hundred] sheep [or cattle] of plaintiff of the value of \$....., they being in a certain field situate in, in county, and drove the same from said field to

2. By reason of which the plaintiff necessarily expended the sum of \$..... in endeavoring to find said sheep [or cattle], and said sheep [or cattle] were greatly injured from the undue haste with which they were driven by said defendant. The plaintiff has sustained damages in the premises in the sum of \$.....

No. 277.

For Shooting a Dog or Other Animal.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant unlawfully shot off and discharged a certain gun then and there loaded with gunpowder and shot, at and against a certain dog of the plaintiff, of the value of \$....., and thereby and therewith so greatly wounded said dog that by reason thereof said dog, on the day of, 18..., died, to the damage of plaintiff in the sum of \$.....

No. 278.

For Letting a Boat Adrift.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the defendant unlawfully seized and took the boat of the plaintiff, of the value of \$....., then floating and being in the river, at or near,

and moored and fastened there with a certain rope of the said plaintiff, and then and there unmoored and unloosened said boat from the place where it was fastened as aforesaid, and thereby set said boat adrift in said river.

2. Whereby said boat was broken to pieces, and lost, to the damage of plaintiff in the sum of \$.....¹

No. 279.

For Keeping Mischievous Animals.

1. The plaintiff complains of the defendant for that on the day of, 18..., and from thence until and at the time of the damage and injury to the plaintiff hereinafter mentioned, said defendant wrongfully kept a certain dog during all that time, well knowing that said dog was accustomed to attack* and bite mankind.

2. On the day of, 18..., while the defendant was the owner of the same, said dog did attack and bite the plaintiff [*describe the injuries received*], and thereby the plaintiff became sick and lame, and so continued for the space of months then next following, and was prevented during all that time from attending to his lawful business, and necessarily expended the sum of \$..... in endeavoring to be cured of said sickness and lameness, to the damage of plaintiff in the sum of \$.....²

No. 280.

Action for Damages for Animals Killed by Dog.

[*Follow the preceding form to the * then say*]: bite, and injure sheep, cattle, etc.

2. On the day of, 18..., while the defendant was the owner of the same, said dog did attack, chase, bite, and worry lambs, the property of the plaintiff, of the value of \$....., by reason whereof..... of said lambs, of the value of \$....., died, and the residue were greatly terrified, damaged, and injured, and rendered of no use or value to the plaintiff, to his damage in the sum of \$.....

¹ See 2 Chitty Pl., 862.

² Id., 597.

No. 281.

For Malicious Injury to Property.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, maliciously intending to injure the plaintiff, willfully mutilated and defaced [*describe property*] belonging to plaintiff, and of the value of \$....., and injured the same to the extent of \$.....

2. The plaintiff was compelled to expend the sum of \$..... to repair the same, to his damage in the sum of \$.....

No. 282.

For Selling Liquor to Minor without Consent of Parents, Guardian, or Master.

1. The plaintiff complains of the defendant for that on the day of, 18..., at his saloon in the city of Omaha, Nebraska, the defendant sold to one C. D. malt, spirituous, and vinous liquors [*or intoxicating drink*].

2. Said C. D., at the time said defendant sold said liquor to him, was but eighteen years of age, and said liquor was sold to him by the defendant without the consent of the parents, guardian, or master of said minor.

3. The plaintiff therefore complains of the defendant for the violation of section five hundred and seventy-four of the criminal code, and alleges that there is due from said defendant to the school fund of Douglas county the sum of \$25.

No. 283.

The Same.

The following is the form given in the statute :

“A. B. complains of C. D. for the violation of section five hundred and seventy-four of the criminal code.”

No. 284.

By Widow and Minor Children against Saloon-keeper for Loss of Means of Support.

1. The plaintiff, for herself and as next friend for her minor children, to-wit: [*give names and ages*], complains of the defendants for that said defendants, on the and days of, 18..., were engaged in business in the retail traffic in intoxicating liquors in the city and county of Seward, in the state of Nebraska, as follows: C. D., for himself, in a place called; E. F. and G. H., as a partnership, under the firm name of F. &

Co., and H. I. J. and K. L., partners under the firm name of J. and L.

2. At the time aforesaid the said, plaintiff, was, and for a long time prior thereto had been, the wife of F. P., now deceased, and then a resident of said county, and the other plaintiffs are their minor children.

3. On the and days of, 18..., the said F. P. became intoxicated and continued in a fit of intoxication and drunkenness for two days in succession, and that he spent his time on those days in the saloons and places of business of these defendants, in said county and state.

4. That all of these defendants sold, gave, and furnished to him, the said F. P., the liquors that caused his intoxication on the days aforesaid, and they furnished him the said liquors in sufficient quantities to cause his intoxication, and did cause his intoxication, and they continued to sell and furnish liquors to said F. P. while he was so intoxicated.

5. On the day of....., 18..., the said F. P. died in the saloon offrom the effect of liquors so sold, given, and furnished to him as aforesaid.

6. The plaintiffs were all dependent upon the said F. P. for their means of support. That the proceeds of his labor and earnings amounted to about the sum of \$...... per year, which he applied to the support of these plaintiffs. That he was about years of age, healthy, energetic, and industrious.

7. The plaintiff and said minor children constitute one family, and are entirely without the means of support. The plaintiffs have sustained damages in the premises in the sum of \$......¹

NO. 285.

Against Liquor Seller for Injuries done by a Drunken Man.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, at his saloon in the town of, sold and delivered to one C. D. ... glass of intoxicating liquor, which the said C. D. then and there drank.

2. By reason thereof said C. D. became intoxicated, and

¹ The above is the substance of the petition in *Roose v. Perkins*, 9 Neb., 304.

while so intoxicated carelessly and violently drove his wagon against the wagon of plaintiff, and overturned the same, and [*state injuries*] to the damage of plaintiff in the sum of \$.....

No. 286.

Penalties under the Statute.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant [*state specifically the violation of the statute complained of*].

2. By the violation of said statute the defendant became indebted to the plaintiff in the sum of \$..... [*amount of penalty*], no part of which has been paid.

CHAPTER XVII.

PETITIONS IN ACTIONS IN EQUITY.

No. 287.

Foreclosure of Note and Mortgage.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant made and delivered to the plaintiff his promissory note in writing, in the words and figures following:

“OMAHA, July 1, 1875.

“Two years after date, for value received, I promise to pay A. B., or order, the sum of \$....., with interest at ... per cent.

“C. D.”

2. To secure the payment of said note the defendant on said day executed and delivered to the plaintiff a mortgage deed, and thereby conveyed to the plaintiff the following described real estate, viz.: [*describe premises*], which deed contained the following condition:

[*Copy condition.*]

3. Said mortgage was duly recorded in the office of the clerk of county, on the day of, 18...

4. The defendant has not paid the amount secured by said mortgage, as required by the conditions thereof, whereby said mortgage deed has become absolute.

5. ¹No proceedings at law have been had for the recovery of the debt secured thereby, nor has any part thereof been collected and paid, and there is now due upon said note and mortgage the sum of \$....., with interest from the day of, 18...

1. The plaintiff therefore prays that said defendants may be foreclosed of all equity of redemption or other interest in said mortgaged premises, and that said premises may be sold according to law, and out of the proceeds thereof the plaintiff may be paid the amount adjudged to be due him on said note and mortgage, with interest and costs of suit.

2. That the defendant be adjudged to pay any deficiency which may remain after applying the proceeds of said sale to the payment of said debt, and for such other relief as may be just and equitable.²

No. 288.

Mortgage where no Note was Given.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, to secure the payment of the sum of \$....., due in years from that date, executed and delivered to plaintiff a mortgage deed, and thereby conveyed to the plaintiff the following described real estate, etc.

[Continue as in preceding form.]

No. 289.

Mortgagee v. Mortgagor to Foreclose for the whole Debt upon Default in Paying Interest.

1, 2, and 3. [As in 287.]

4. The interest on said note and mortgage, which became due on the day of, 18..., is still unpaid, and more than days have elapsed since the same became due. The plaintiff elects, as is provided he may in the conditions of said mortgage, to declare the whole sum secured by said mortgage, to-wit: the sum of \$....., to be due and payable.

[Continue as in 287.]

¹ As to this allegation see *Gregory v. Hartley*, 6 Neb., 356.

² It is unnecessary to attach a copy of the mortgage; the note is the debt.

No. 290.

Claim for Insurance.

1, 2, and 3. [*As in 287.*]

4. Said defendant did not keep said premises insured as required by the covenants in said mortgage, but wholly failed so to do. The plaintiff therefore, on the day of, 18..., caused said premises to be insured against damage by fire in the company until the day of, 18..., and paid as a premium therefor the sum of \$.....

[*Continue as in 286, adding prayer for insurance.*]

No. 291.

Claim for Taxes Paid by Mortgagee.

1, 2, and 3. [*As in 287.*]

4. Said defendant wholly failed to pay the taxes due on said land, amounting to the sum of \$....., as required by the covenants in said mortgage, but made default therein, and on or about the day of, 18..., the plaintiff, to protect his security and to prevent a sale of said land for said taxes, paid the same, amounting with interest to the sum of \$.....

[*Continue as in 286, adding prayer for the taxes paid.*]

No. 292.

Action by Assignee of Mortgagee v. Mortgagor and Incumbrancers, and Alleging that a Judgment in an Action at Law had been Recovered on the Note.

1. The plaintiff complains of the defendant for that on the day of, 18..., C. D., one of the defendants, executed and delivered to one A. B. his promissory note, in words and figures following:

“FALLS CITY, July 1, 1875.

“Two years after date, for value received I promise to pay A. B., or order, the sum of \$....., with interest at ... per cent.

“C. D.”

2. To secure the payment of said note, said defendant, on said day, executed and delivered to said A. B. a mortgage deed, and thereby conveyed to said A. B. the following described real estate, viz.: [*describe premises*], which deed contained the following conditions:

[*Copy conditions.*]

3. Said mortgage was duly recorded in the office of the clerk of county, on the day of, 18...

4. The defendant has not paid the amount secured by said mortgage, as required by the conditions thereof, whereby said mortgage has become absolute.

5. On the day of, 18..., said, for a valuable consideration, assigned said note and mortgage and the moneys due thereon to the plaintiff.

6. On the day of, 18..., one recovered a judgment in the district court of county, against said, defendant, for the sum of \$....., the lien of which is prior to that of plaintiff. The defendants, G. H. and I. J., claim to have an incumbrance by mortgage upon said premises subsequent to that of plaintiff, but the nature or extent of their interest therein is unknown to plaintiff.¹

7. On the day of, 18..., the plaintiff recovered a judgment in the district court of county, against C. D., defendant herein, upon the note in question, for the sum of \$....., upon which an execution was issued on the day of, 18..., and within sixty days thereafter was returned wholly unsatisfied, and said defendant has no property whereof to satisfy said execution, except the mortgaged premises, and no part of said debt has been collected and paid.

1. The plaintiff therefore prays that said defendants may be foreclosed and barred of all right, lien, and equity of redemption in said mortgaged premises.

2. That the lien of G. H. and I. J. upon said mortgaged premises may be decreed to be junior and inferior to that of plaintiff's mortgage.

3. That said premises may be sold according to law, and

¹ This allegation is sufficient as to subsequent incumbrances, the contest in such cases being merely over the surplus. But it is doubtful if such a general allegation will bar rights paramount to the right of the mortgagee. See *Lewis v. Green*, 9 N. Y., 502.

² In case of other incumbrances, if the nature of the interest or lien is known it should be correctly set forth in the petition. Nothing is gained by a failure to state such interest. Cases frequently occur, however, where it is uncertain what is the amount due, or where questions as to the validity of the apparent incumbrance arise, where it seems necessary to make a general allegation.

out of the proceeds thereof the plaintiff may be paid the amount adjudged to be due him on said note and mortgage, with interest and costs of suit; and that said defendant, C. D., may be adjudged to pay any deficiency which may remain after applying the proceeds of said sale to the payment of said debt, and for such other relief as may be just and equitable.

No. 293.

Application for a Receiver.

1, 2, 3, and 4. [*As in preceding form.*]

5. The present value of said premises does not exceed the sum of \$....., and a large amount of delinquent taxes for the years 18..., 18..., and 18... are due against said property, amounting to the sum of \$.....; and the fences and buildings on said land are being destroyed, and said property is rapidly depreciating in value, and the rental value thereof does not exceed the sum of \$..... per annum; that said premises are insufficient security for plaintiff's debt, and the defendant, C. D., is insolvent. [*Continue as in preceding form. Add to the prayer that a receiver be appointed to collect the rents and profits, etc.*]

No. 294.

By Purchaser under a Senior Mortgage in Possession under a Decree of Foreclosure and Sale where Junior Incumbrances were not made Parties to the Action.

1. The plaintiff complains of the defendant for that on the day of, 18..., one obtained a decree of foreclosure and sale in the district court of county, of the following described premises, viz.: [*describe premises*], in an action pending in said court, wherein was plaintiff and defendant.

2. That afterwards said premises were sold under said decree, and the plaintiff became the purchaser thereof for the sum of \$....., which was duly paid, and thereafter said sale was duly reported to said court, and in all things confirmed, and a deed in due form was, on or about the day of 18..., made by the sheriff [*or master*] of said court to the plaintiff, who thereupon entered into possession of said premises, and still retains possession of the same.

3. Plaintiff has made the following necessary improvements on said land:

Repairing house.....	\$.....
Putting roof on barn.....	\$.....
80 rods of fence to protect orchard.....	\$.....
Taxes paid	\$.....
Amounting in the aggregate to the sum of.....	\$.....

4. One C. D. claims to be the owner of a mortgage upon said premises executed by [*the mortgagor*] subsequently to that under which plaintiff claims title, upon which he claims there is due the sum of \$....., with interest from the day of, 18..., and also alleges that he was not made a party defendant to the action to foreclose the mortgage under which plaintiff claims title.

5. On the day of, 18..., the plaintiff requested the defendant to pay him the amount of said purchase money paid by plaintiff for said premises, and also for the improvements made thereon by him, but said defendant refused and still refuses to comply with any part of plaintiff's request.

The plaintiff therefore prays that an account may be taken of the amount due plaintiff for said purchase money of said land, and also for necessary improvements thereon and taxes, and that defendant be required to pay plaintiff said sums by a day to be appointed by the court for that purpose, or in default thereof that said defendant and all persons claiming under him be forever foreclosed and debarred of all right and equity of redemption in and to said mortgaged premises, and for such other relief as may be just and equitable.¹

No. 295.

Mortgagor against the Mortgagee in Possession.

1, 2, and 3. [*As in 292.*]

4. The plaintiff has paid to the defendant the following amounts upon said mortgage, viz.: May ..., 18..., \$....., May ..., 18..., \$....., and on the day of, 18..., tendered to the defendant the further sum of \$....., which he refused to receive.

5. On or about the day of, 18..., said defendant entered into possession of said premises, and from that time un-

¹ See *Renard v. Brown*, 7 Neb., 449.

til the present has received the rents and profits thereof, amounting to about the sum of \$....., which he has applied to his own use.

6. On the day of, 18..., the plaintiff applied to said defendant to account for said rents and profits, and to pay to plaintiff the amount thereof received by him in excess of the principal and interest due on said mortgage, and to deliver possession of said premises to plaintiff, which he then refused and still refuses to do.

1. The plaintiff therefore prays that an account may be taken of the amount due to said defendant upon said note and mortgage.

2. That an account may be taken of the rents and profits of said mortgaged premises received by said defendant, and that the plaintiff may be permitted to redeem said premises upon paying the amount that may be found remaining due to the defendant, and that the defendant be required to acknowledge satisfaction of said mortgage upon the records, and deliver possession of said premises, and for such other relief as may be just and equitable.

No. 296.

By Junior Incumbrancer v. the Purchaser under a Decree of Foreclosure of a Senior Mortgage, to which he was not a Party, to Redeem the Senior Mortgage.

1. The plaintiff complains of the defendant for that on the day of, 18..., one A. B. executed and delivered to C. D. a mortgage upon the following described real estate, viz.: [*describe premises*], to secure the payment of the sum of \$....., due in years from that date.

2. On the day of, 18..., a decree of foreclosure and sale was duly rendered on said mortgage in the court of county, and said premises were thereupon sold under said decree to the defendant for the sum of \$....., which sale was thereafter confirmed by said court, and a deed duly executed and delivered to the defendant, who is now in possession of said premises.

3. On the day of, 18..., said A. B. executed and delivered to the plaintiff a promissory note in writing, in the words and figures following:

"MADISON, January 1, 1875.

"Three years from date, for value received I promise to pay E. F., or order, the sum of \$....., with interest, payable annually, at the rate of per cent. "A. B."

4. To secure the payment of said note said A. B. on said day executed and delivered to plaintiff a mortgage deed, and thereby conveyed to plaintiff the above described premises, which deed contained the following conditions:

[*Copy condition.*]

5. Said mortgage was duly recorded in the office of the county clerk of county on the day of, 18....

6. Said A. B. has not paid the amount secured by said mortgage, as required by the conditions thereof, whereby said mortgage has become absolute.

7. No proceedings have been had at law for the recovery of the debt secured thereby, nor has any part thereof been collected and paid, and there is now due thereon the sum of \$

8. In the action to foreclose the mortgage under which the defendant claims title to said premises, the plaintiff was not made a party, nor did he appear in the action, nor does the decree in that action affect his rights in the premises.

9. The plaintiff therefore prays that an account may be taken of the amount due plaintiff upon said note and mortgage, and that said defendant be required to pay the same within a time to be fixed by the court, or in case he fail to pay the same, that said premises be sold, as required by law, and out of the proceeds thereof to pay, first, said defendant the amount of said senior mortgage, and second, to pay the amount due plaintiff, with interest and costs of suit, and for such other relief as may be just and equitable.¹

No. 297.

By Lessee of Mortgagor to Redeem.

1. The plaintiff complains of the defendant for that on the day of, 18..., one C. D. leased to the plaintiff the

¹ A junior incumbrancer does not redeem the land, but merely the senior incumbrance. The land ordinarily will be ordered sold, and the incumbrances paid in the order of their priority. *Pardee v. Van Anken*, 3 Barb., 537. *Miller v. Finn*, 1 Neb., 301. *Renard v. Brown*, 7 Id., 447.

following described premises, viz.: [*describe premises*], by a written lease, for the term of years, at a yearly rent of \$....., and that plaintiff thereupon entered upon and still retains the possession of said premises under said lease.

2. The said C. D., being the owner in fee of said real estate, on the day of, 18..., made and delivered to E. F., defendant, a mortgage of said premises to secure the payment of the sum of \$....., due on the day of, 18...

3. Said mortgage was not paid when the same became due, and thereupon the defendant, E. F., commenced an action of foreclosure against C. D., in the district court of county, and on the day of, 18..., a decree of foreclosure of said mortgage was rendered, and a sale of said premises ordered.

4. The plaintiff was not made a party in the action to foreclose the mortgage and is not bound by the decree.

5. On the day of, 18..., the plaintiff tendered to the said E. F. the sum due upon said decree and the costs of suit, and demanded an assignment of the same for the purpose of protecting his lease, which was refused.

6. The plaintiff now offers to pay the amount of said decree, interest, and costs, and demands an assignment of the same.

7. The plaintiff therefore prays that he may be permitted to pay the amount due thereon, and that upon such payment, the defendant be required to assign said decree, etc., to plaintiff, and for such other relief as is just and equitable.

No. 298.

Assignor of Mortgage Promising Payment.

1, 2, and 3. [*As in No. 292.*]

4. On the day of, 18..., said defendant [*assignor*] assigned said note and mortgage to plaintiff by an instrument in writing in the words and figures, to-wit: [*copy assignment*], by which said defendant promised the plaintiff to pay the amount due on said mortgage, viz.: \$....., at the time the same became due.

[*Continue as in 287.*]

No. 299.

To Foreclose Chattel Mortgage.

1. [*As in 287.*]

2. To secure the payment of said note the defendant, on the day of, 18..., executed and delivered to the plaintiff an instrument in writing, duly signed [*and acknowledged*] by said defendant, by which he conveyed to defendant as security for said note the following described goods and chattels, viz.: [*describe goods as in the mortgage*].

3. On the day of, 18..., said instrument was duly filed for record in the office of the county clerk of county.

4. The defendant did not pay said note when the same became due, nor has he yet paid the same, or any part thereof, and no proceedings have been had at law for the recovery of said debt.

5. There is now due from the defendant to the plaintiff thereon the sum of \$.....

6. The plaintiff therefore prays that said goods may be ordered sold and the proceeds thereof applied in payment of amount found due on said note and mortgage and costs of suit, and in case of deficiency after applying the proceeds of said sale, that judgment be rendered against the defendant for the same, and for such other relief as may be just and equitable.

No. 300.

To Foreclose Mechanic's Lien.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the plaintiff entered into an oral [*or written*] contract with the defendant to furnish to him fifty thousand brick at \$..... per thousand, for the erection of a dwelling house on lot, in block, in the city of [*A copy of said written contract is hereto attached.*]

2. In pursuance of said contract the plaintiff furnished said brick to the defendant for the erection of said house, on and between the day of, 18..., and the day of, 18..., for the sum of \$..... per thousand, amounting in the aggregate to the sum of \$.....

3. The defendant at the time the plaintiff furnished said brick

was the owner in fee of said lot. [*State character of title according to the fact.*]

4. On the day of, 18..., and within four months from the time of furnishing said material, the plaintiff made an account in writing of the items of such material furnished the defendant under said contract, and after making oath thereto as required by law, filed the same in the clerk's office of county, and claiming a mechanics' lien therefor upon said lot and the building thereon.

5. The sum of \$....., with interest from the day of, 18..., now remains due and unpaid on said account. .

The plaintiff therefore prays judgment against the defendant for the sum of \$....., with interest from the day of, 18..., and costs of suit, and that said premises may be sold and the proceeds thereof applied to the payment of said judgment, interest, and costs, and for such other and further relief as may be just and equitable.¹

NO. 301.

Allegation of Fraudulent Lien.

1 to 5. [*As in preceding form.*]

6. On the day of, 18..., the defendant, G. H., conspiring with other defendants to defraud the plaintiff, filed a lien against said as owner, and upon said premises, for the sum of \$.....

7. The said defendant,, is not indebted to G. H. in any sum whatever for labor, skill, (machinery), or material furnished by him for the erection or repair of said dwelling-house, and said G. H. has no valid lien thereon. Said lien, if permitted to remain in force, will greatly diminish or wholly defeat the lien of plaintiff.

Add to the prayer "that said lien of the defendant, G. H., may be declared fraudulent and void, and set aside," etc.

¹ The rule as to parties would seem to be the same as in cases of foreclosures of mortgages, as the purchaser takes only the title of the parties to the action. As between lien holders under the mechanics' lien law, there is no priority. *Choteau v. Thompson*, 2 O. S., 115.

Sub-contractors and laborers acquire no lien against the structure, but have a personal claim against the owner, to be enforced by an ordinary action. *Ripley v. Gage Co.*, 3 Neb., 404.

No. 302.

Where Lien Holders and Incumbrancers are Made Parties.

1 to 5. [As in No. 300.]

6. The plaintiff is informed and believes that has a mechanics' lien on said premises filed, 18..., to secure the payment of the sum of \$....., and that on the day of, 18..., [the owner] executed a mortgage thereon to one to secure the payment of the sum of \$....., which mortgage is subject to the lien of plaintiff.

[Continue as in 299.]

No. 303.

Vendors' Lien. Vendor v. Vendee.¹

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was the owner in fee of the following described real estate, viz.: [describe premises], and on said day sold and conveyed the same by deed to the defendant.

2. The defendant agreed to pay the plaintiff the sum of \$..... for said premises, of which sum he paid the plaintiff at the time of the delivery of the deed \$....., and gave the plaintiff a promissory note for the residue thereof, due and payable on the day of, 18...

3. At the time said note became due the plaintiff requested payment of the same from the defendant, which was refused.

4. No part thereof has been paid, and there is due from the defendant to the plaintiff thereon the sum of \$.....

The plaintiff therefore prays judgment against the defendant for the sum of \$....., with interest thereon from the day of, 18..., and costs of suit, and in case said defendant fails to pay said judgment by a day to be named by the court, that said premises may be sold, and so much of the proceeds as may be required may be applied to the payment of said judgment.

No. 304.

Against Purchaser and his Grantee.

1, 2, and 3. [As in No. 303.]

4. On the day of, 18..., said defendant [pur-

¹ The vendor who has conveyed by deed has no lien in Kansas and Nebraska—*Sampson v. Munde*, 3 Kansas 173, *Brown v. Sampson*, 4 Id. 76, *Edminster v. Higgins*, 6 Neb., 265—secret liens being regarded as inconsistent with the registry acts.

chaser] sold and conveyed [*describe portion conveyed*] to one G. H. for the sum of \$....., but the plaintiff avers that the said G. H. had full knowledge at the time of making said purchase that said [*purchaser*] was still indebted to the plaintiff in the sum of \$..... for the purchase price of said premises.

[*Continue as in 303.*]

No. 305.

*Against Judgment Creditors of Purchaser.*¹

1, 2, and 3. [*As in 303.*]

4. On the day of, 18..., one recovered a judgment against [*the purchaser or his grantee*] in the district court of county for the sum of \$....., which judgment is an apparent lien upon said land, but the plaintiff alleges that said lien is subject to the lien of plaintiff therein, and can only attach to the actual interest of said [*the purchaser*] in said land. That said [*purchaser*] is wholly insolvent and unable to pay the amount of plaintiff's demand.

[*Continue as in No. 303.*]

Add to the prayer that the lien of the judgment may be declared subject to the plaintiff's lien.

INJUNCTIONS.

No. 306.

To Enjoin the Transfer and Collection of Note or Bill.

1. The plaintiff complains of the defendant for that on the day of, 18..., he made and delivered to the defendant a promissory note in the words and figures following:

"SEWARD, NEB., July 1, 1876.

"Six months after date, for value received I promise to pay C. D., or order, the sum of \$....., with interest at ... per cent.

"A. B."

2. The plaintiff received no consideration whatever for said note, it being given for a pretended patent right for an article designated as [..... *cement*], said defendant representing to

¹ The lien of a judgment attaches merely to the interest of the debtor in the land. *Uhl v. May*, 5 Neb., 157. *Galway v. Malchow*, 7 Neb., 285. *Metz v. State Bank*, Id., 165. *Marshfield v. Gregory*, 8 Id., 435.

plaintiff that he had a valid patent right for said article, when in fact said patent then was and now is void and of no validity whatever; but plaintiff, relying upon said representations of defendant, was induced to make and deliver to him said note.

3. Said defendant is about to transfer said note to an innocent purchaser for value in order to prevent the plaintiff from making a defense to the same.

4. The plaintiff now offers to return said pretended patent right to defendant.

The plaintiff therefore prays that said defendant may be enjoined from negotiating or transferring said promissory note, and that upon the final hearing said note may be delivered up and canceled, and for such other relief as may be just and equitable.

No. 307.

To Enjoin a Judicial Sale.¹

1. The plaintiff complains of the defendant for that on the day of, 1875, the plaintiff was, and from thence hitherto and still is, the owner and in possession of the following described premises, viz.: [*describe premises*]; that plaintiff purchased said premises at the date aforesaid from one C. D. for the sum of \$....., which sum was fully paid prior to the day of, 1877, but the legal title to said premises has remained in said C. D.

2. On or about the day of, 1877, one recovered a judgment for the sum of \$....., in the district court of county against said C. D., and on or about the day of, 1877, an execution was issued on said judgment at the instance of, the plaintiff therein, and placed in the hands of, sheriff of county, who on the day of, 1877, levied the same upon said real estate as the property of said C. D., and has advertised said real estate for sale under said execution, on the day of, 18....

3. Said judgment is not now nor at any time has been a lien upon said real estate, or any part thereof, as said C. D., since the recovery of said judgment, has had no interest therein whatever,

¹ See *Uhl v. May*, 5 Neb., 157. *Coke Co. v. Munsell*, 19 Iowa, 305.

and a sale of said real estate under said execution will cast a cloud upon plaintiff's title to the same.

The plaintiff therefore prays for an order restraining the sale of said real estate under said execution, and that on the final hearing of such cause said injunction may be made perpetual, and that defendant may be forever enjoined from enforcing said judgment against said real estate, and that the title to the same may be quieted and confirmed in plaintiff, and for such other relief as is just and equitable.

No. 308.

To Restrain County Commissioners from Illegally Exempting Property from Taxation.

1. Your petitioner, the Union Pacific Railroad Company, complaining of the defendants above named, says: That it is a corporation duly organized and existing under and by virtue of the laws of the United States and pursuant to an act of the Congress thereof, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862, and the acts amendatory thereto.

2. That the above named Corydon D. Smith, John H. Clawson, and John Fleming, are the duly elected and qualified and acting commissioners of the county of Saunders, in the state of Nebraska, and that Isaac Coberley is the county clerk thereof.

3. That the plaintiff owns and operates a line of railroad from Omaha, Nebraska, westward to Ogden, in the territory of Utah; that it has a large amount of taxable lands and property in said county of Saunders, and is a large tax payer therein.

4. That the various assessors for the several precincts in said county, in pursuance of the statutes in such case made and provided, have been, during the present year and up to the present time, engaged in assessing for taxation the real estate, personal property, and all other taxable property in their said county; that among other property so assessed they have duly assessed and valued the said lands and property of your petitioner at their fair cash value, without any deductions therefrom on account of

improvements thereon, cultivation of fruit, forest, or ornamental trees thereon, or for any other reason; that the assessed valuation of said county for the year 1877 was about \$2,000,000, and the same for the present year will be somewhat in excess of said sum; that the said several assessors of said county, pretending and affirming that an act of the Legislature, passed February 12, 1869, and entitled "An act to encourage the growth of timber and fruit trees," is a valid and subsisting law of the state, and that they are in duty bound to comply therewith, have, in making their several assessments for the present year, allowed deductions and exemptions in the valuation and amount of property legally taxable, in pursuance of the terms of said act, whenever the same has been claimed by the property owners of said county, in returning their property for assessment and taxation; that they have made such deductions from the legal valuation and assessment of taxable property in said county in about the sum of \$120,000, and if the assessment so made by said assessors is permitted to stand, and the said deductions as made by them are to be allowed by the county commissioners of said county in making up the county assessment and tax list, and in levying and collecting taxes, then there will be about \$120,000 worth of taxable property in said county that will escape taxation, and the balance of the taxable property of said county will have to pay the entire tax levied in said county for state, county, and other purposes, and thereby the rate of taxation and amount of tax assessed and collected from all other taxable property in said county from your petitioner will be largely and unlawfully increased, and your petitioner will be required and compelled to pay more than its just and legal proportion of taxes upon its taxable property, and will in fact be compelled to pay a portion of taxes that the property so exempted from taxation ought in law and in justice to pay; and by reason of said large deductions from the assessed valuation of the taxable property of said county, the amount of revenue that ought to be collected in said county for state purposes will be largely increased, and the revenue of the state thereby in a measure impaired; that the said several assessors have returned and will return to the board of county commissioners of said county in their several assess-

ments the names of the several persons claiming exemption from taxation under the provisions of said act, the quantity of lands planted to timber or fruit trees, and the amount deducted from the valuation of the several persons' property, which returns will show that about said amount of \$120,000 has been so deducted by them.

5. And said plaintiff says that said board of county commissioners, consisting of said named defendants and of said above named county clerk, will meet as required by law as a board of equalization for said county on the third Monday of April next, for the purpose of completing, correcting, and equalizing the assessment roll of said county, and will, unless restrained by the order of this court, correct and equalize said list without embracing therein the amount of property as aforesaid deducted therefrom by the several assessors, and will thereafter proceed to levy the state, county, and other taxes by law required to be levied upon said balance of the assessed property of said county, as will appear upon the said assessment roll thereof, without embracing and including therein said property so deducted by said assessors and so exempted from taxation, and thereby a great and irreparable injury will be done to your petitioner and to the many other taxpayers of said county, who will thereby be compelled to pay more than their legal or equitable share of taxes, and to the state of Nebraska, whose revenues will be thereby seriously impaired.

6. Your petitioner represents that it and all other tax payers of said county are without remedy, unless in a court of equity; that no remedy can be had in a court of law whatever; and even if there was a remedy at law the same would involve a multiplicity of suits, and would be so uncertain and protracted as to be of no avail.

Your petitioner further shows that this case and the subject matter here involved is one relating to the revenue, and of which this court has original jurisdiction.

7. Your petitioner further shows to the court that the aforesaid act of the legislature of 1869, and the exemption thereby created, is unconstitutional and void, as being in conflict with the present constitution of Nebraska; that the same is not a

valid and subsisting law of this state; that the same is in conflict with the provisions of a general law of Nebraska, approved February 19, 1877, and neither by the constitution or laws of Nebraska can property be exempted from taxation in the manner set forth hereinbefore, and any attempt so to do is without authority of law and is null and void.

Wherefore plaintiff, etc.

POPPLETON & THURSTON,
Attorneys.

No. 309.

To Restrain a Party from Cutting a Ditch and Flowing Water from a Pond on to Plaintiff's Land.

1. The plaintiff complains of the defendant for that the plaintiff, ever since the first day of February, 1875, has been and now is the owner and in possession of [*describe premises*].

2. The defendant is the owner of the [*describe premises*], adjoining said premises of plaintiff.

3. Upon the land owned by the defendant is a pond covering about five acres, which pond is the natural reservoir for surface water accumulating upon a low tract of land surrounding said pond, to-wit: about one hundred acres. That there is no natural outlet to said pond, but the water is carried away only by evaporation and percolation.

4. On or about the day of, 18..., the defendant dug a ditch from said pond across the land so owned by him to plaintiff's land, which ditch draws all the water from said pond on to the land of plaintiff, and causes the same to flow over and across plaintiff's land, by reason of which a considerable portion of plaintiff's land cannot be cultivated, and is rendered unfit for use.

5. That all of said acts of defendant in digging said ditch and draining said pond were done without the consent of plaintiff.

6. The injuries so caused to plaintiff and his said land are continuing injuries; that water flows in large quantities through said ditch of defendant on to plaintiff's land during and after each shower of rain, and from melting snows in the spring season, and renders said land unfit for tillage and for use; and

that, from the nature of the injury, damages cannot be computed in money, and the plaintiff has no adequate remedy at law.¹

The plaintiff therefore prays, etc.

No. 310.

To Restrain City Authorities from Collecting a Special Tax Illegally Assessed for Grading upon Changing the Grade of the Streets, and Charging Fraud and Collusion between the City Council and the Contractor.

Now come the plaintiffs, and, on behalf of themselves and all others similarly situated, complain of the defendants, the city of Omaha, C. D., treasurer of the city of Omaha, and E. F., and for cause of such complaint state the following facts:

1. That heretofore, to-wit: on the second day of February, 1857, the said city of Omaha was, and has ever since been, and still is, a municipal corporation under and by virtue of a certain act of the legislature of the then territory of Nebraska, entitled "An act to incorporate the city of Omaha," approved on the second day of February, 1857, and certain acts supplemental to and amendatory thereof, and under and by virtue of an act of the legislature of the state of Nebraska, entitled "An act to incorporate cities of the first class," approved on the twenty-eighth day of March, 1873, with power to lay out and establish streets and alleys, to establish and alter grades thereon within its corporate limits in the manner provided in said several acts, and, by the terms of said last mentioned act, power to defray the costs and expenses of any and all improvements, whether incurred by grading or otherwise, and the mayor and common council of said city having also, by the terms of said last mentioned act, power and authority to levy and collect special taxes and assessments upon the lots and pieces of ground adjacent to and abutting upon the street or alley graded or otherwise improved or repaired. Such taxes and assessments to be levied, collected, and paid, one-half thereof out of the general fund of the city, and one-half out of the lots and lands bounding and abutting on the line of the street upon which such grading or other improvement had been done, said tax or assessment to be either in proportion to the feet front so bounding or abutting on

¹ The above is the substance of the petition in *Davis v. Londgreen*, 8 Neb., 46.

said streets, or according to the value of such lots or lands as shown by the last previous assessment thereof for general city purposes, as the city council of said city may in each case determine.

2. That the said defendant, the city of Omaha, by its mayor and common council, desiring to change the grade from that as established in 1868 on Howard street, and 1866 on St. Mary's avenue, as hereinafter stated, upon Henry street west of Fifteenth street and St. Mary's avenue, extending west from the west end of said Howard street to the west side of Jacobs' addition to said city, did, on the tenth day of July, 1874, contract and agree with defendant E. F. to do the necessary work in order to bring said street to the established grade thereof according to the plans, specifications, and profile previously adopted and declared by said mayor and council to be the established grade of said street, a copy of said specifications being hereto attached, marked "Exhibit One," said city thereby agreeing to pay the said E. F. the sum of \$6,240 in warrants drawn upon the treasurer of said city, one-half drawn on the general fund and one-half out of a special fund arising from assessments to be levied upon the property along the line of said streets for doing the said work, he, the said E. F., being the lowest responsible bidder as determined by the said council for the same. That the said E. F. has proceeded with the work, completing the same, and in order to raise the sum of money so as aforesaid agreed upon, and in order to pay for the same, the said mayor and common council did propose on the next meeting of said common council, or soon thereafter, to pass and enact an ordinance of said city levying and assessing the sum of \$3,120, the same being one-half the contract price aforesaid, upon all the property bounding or abutting upon the line of said street, in proportion to the feet front of lots and lands so bounding or abutting thereon, in accordance with the terms of said charter and the acts, proceedings, and resolutions of said council heretofore had and adopted in that regard so authorizing the said tax to be levied, as follows:

"By Mr.—*Resolved*, That the engineer be and he is hereby instructed, in making up the assessment for the levy of

the special tax for grading, any and all streets be so graded as to make his levy according to the last assessment made and returned to the city clerk, and not per front foot."

And have, with this end in view, introduced an ordinance which by its terms so levies the said tax, said ordinance having been read the first and second time and referred to the judiciary committee, in whose hands the said ordinance now is. Plaintiffs further say that Howard street is a street laid out and running from the Missouri river west to a point where it intersects Seventeenth street in said city. That said Howard street is entirely independent and a different street from St. Mary's avenue. That the ordinances establishing the grades of said streets are entirely separate and distinct, as much so as that of any other two streets in the city. That the property lying on said Howard street west of Fifteenth street bears no more relation to the property lying on the line of St. Mary's avenue than it does to that of Fifteenth street, upon which last mentioned street at the same time a uniform grade was established with that of Howard street, and which is now being worked to that grade. That the said property on the line of said Howard street should not therefore bear its proportion of the cost and expense of the grading of said avenue any more than that of any other street in said city, inasmuch as the expense of grading is only about \$....., while the said ordinance proposed as aforesaid levying the said tax as aforesaid makes no distinction whatever in the two streets, but imposes the burden upon said Howard street, which is manifestly unequal and unjust, and ought not to be enforced.

3. Plaintiffs further say that they are the owners of the following described tracts of land bounding and abutting on the line of said streets, and which lands are supposed to be liable to pay their several proportions of said tax in said ordinance provided, viz.: [*here is set out the property of each of the plaintiffs*].

4. The plaintiffs further say that on said Howard street west of Fifteenth street as aforesaid, and on said St. Mary's avenue about 500 feet west of the west line of the said lands of the plaintiff Crary, the proper city authorities of the said city did, in the years 1866 and 1868 aforesaid, establish and fix a grade hereof, to which grade the said plaintiffs, between said points [*excepting*

said *Hurford and Hurford, their lands being vacant*], had in all respects conformed, erecting large and substantial improvements thereon, beautifying and improving said premises and occupying the same as homes for themselves and families. But notwithstanding said fact, and without their consent, and against their objection and protest, the said defendant, the city of Omaha, by its mayor and common council, in the year 1873 sought to change said grade and establish and fix another and different grade between said points, and establish a new grade upon the west end of said avenue from the said point as aforesaid west from the said Crary's land as aforesaid, and along and in front of the said lands of the said plaintiff Rhodes. But plaintiffs allege the fact to be that the said mayor and common council did not in the year 1873 aforesaid, nor ever afterward until July 14, 1874, pretend to pursue the steps pointed out and required by its charter to change and establish the grades upon said streets. That said steps were not taken until the said eighteenth day of July aforesaid, that being the day upon which the mayor and common council of said city appointed the appraisers by its charter required, to appraise the damages to property owners on the line of said streets, and such grade was not changed until July 21, 1874, at which time the appraisers appointed as aforesaid appraised the damages to said property owners as aforesaid, and the damages by them awarded were upon said mentioned day, and not before rendered to said owners. But notwithstanding such facts, and it being well known to the said city of Omaha and the said E. F., that no change had been made in the grades of said streets in the manner required by law, and that their action in that behalf was wholly void, did as aforesaid enter into said contract with said E. F., and in pursuance thereof, and well knowing the same to be illegal and void, the said E. F. did commence the work of grading said streets, working some portions of the same to the grade line of the same as pretended to have been established and changed as aforesaid in 1873, and in so doing, between the date of his contract and the said twenty-first day of July, 1874, he, the said E. F., had by the terms of said contract earned, and the said city had become liable by the terms thereof, for the sum of

about \$2,000. One-half of said last mentioned sum it is now proposed by the terms of said ordinance and by the said city authorities to assess and lay upon the lands of said plaintiffs as aforesaid and others similarly situated, and one-half to be paid out of the general fund aforesaid, of which item plaintiffs will be compelled to have their due proportion in taxation, to be assessed and levied upon their said property as provided by law in that behalf provided for general taxation. Plaintiffs further allege that the said mayor and common council had no power or authority to enter into said contract or to authorize or empower said E. F. to do said work on said streets as aforesaid until after the said twenty-first day of July, 1874, and have no power or authority to levy any portion of said sum of money last aforesaid mentioned upon the said lands of plaintiffs or pay any portion thereof out of the said general fund. That the work so as aforesaid performed by the said E. F. upon said street prior to the said twenty-first day of July, 1874, was done by him on his own responsibility, and is of no binding force or obligation on these plaintiffs or upon said city, and ought not to be enforced against their said lots and lands. Copies of the said contract and the said ordinance pretending to establish said grade on said streets are hereto annexed, marked "A" and "B" respectively. Plaintiffs further say that a majority of the property on the line of said streets was far more valuable for residence purposes—the only purpose for which it can be or will be used—before the alteration of said grade than now. That said streets were in good condition and traveled by all residents and others who desired with ease and comfort, and the grade was sufficient as established in 1866 and 1868 aforesaid to accommodate all persons for ordinary vehicle travel. But the plaintiffs charge the fact to be that the defendant E. F., being the owner of a large tract of land near the west end of said avenue, having laid the same off into lots and blocks, and desiring to sell and dispose of the same to the best advantage, but being unable so to do until he could obtain a line of street cars to run out upon said Howard street and said avenue, and being largely interested in a line of street cars known as "The Omaha Horse Railway Company," and desiring for the benefit of his interest in said horse railway, as well

as for his interest in said lands, to extend said railway out to said lands, did, as plaintiffs are informed and believe, conspire with one, the ostensible owner of said railway, and at the times hereinbefore alleged a member of said common council, and with one and one, also members of said council, who resided upon or near the line of said street and avenue, to obtain from the said common council an order requiring the grade of said streets as aforesaid to be changed and graded, holding out as an inducement to the other members of said council the grading of certain other streets in said city, which would greatly enhance the value of the property of the said other members of the said body, and did, by means of said inducement and the interests of the said,, and, procure the said order and the letting of the said contract as aforesaid. That the said change of grade and the ordering of said grading and the letting of the contract therefor were induced by the persistent efforts and interests of the said,,, and, hoping and intending thereby to benefit themselves, but not for any public interest or benefit, but knowing full well that it would not in any way tend to the public benefit, but that the burdens thereby created would be grievous to be borne.

5. The plaintiffs further state to the court, for the purpose of showing the great irregularity and injustice of the assessment, that the lands of said plaintiff Turner embrace a frontage on said Howard street of 132 feet, and by such pretended change of grade the street in front thereof is lowered at least thirteen feet, thereby causing him damage in the sum of \$1,500. That the lands of the plaintiff Lowe embrace a frontage on said Howard street of 396 feet on either side of said street, and are damaged by both cuts and fills in front thereof in the sum of \$2,500; while on said Howard street, near the corner of Fifteenth, is the property of one McAusland and one Anderson, having a frontage each on said street of 132 feet, which is greatly benefited and enhanced in value by reason of said change of grade. That the said plaintiffs Hurford and Hurford's said land embraces a frontage on said St. Mary's avenue of 660 feet, and are damaged by being filled in front thereof in the sum of \$1,000, while the lands ad-

joining on the west thereof and belonging to one McKellogon and one Leavitt, and embracing a frontage in the aggregate on said avenue of 144 feet, are greatly benefited by said grade as aforesaid. That the lands of said plaintiff Kennedy, embracing a frontage on said avenue of 180 feet, are greatly damaged by a fill of seven feet in front thereof, and the property of said plaintiff Crary, embracing a frontage on said avenue of 300 feet, is greatly damaged by a cut in front thereof of about eighteen feet, while the property of one Clarkson, embracing a frontage on said avenue of 360 feet, and lying immediately adjoining and between said lands of plaintiffs Crary and Kennedy, is greatly benefited and enhanced in value by said grading and improvement. That upon the whole line of said street and avenue some of the property thereon is greatly benefited and enhanced in value by reason of said grading and improvement aforesaid, while other of said property is greatly injured by reason thereof. That the same is true of that portion of said avenue lying west of said Crary's land, upon which a grade was first attempted to be established in 1873, as aforesaid, and which was not included within the grade as established in 1866 as aforesaid. That the lot of the plaintiff Rhodes as aforesaid, lying on the south-side of said avenue, and embracing a frontage of 145 feet, is filled twenty feet in front thereof, bringing the said grade nearly on a level with the lower edge of the roof of said dwelling-house thereon, and rendering the same entirely useless and valueless for homestead purposes, or in fact for any other, while other property on both sides and in front thereof, and especially that of the said Gibson, is greatly improved and benefited by said grade; but notwithstanding the gross injustice and great burdens imposed upon some of the property owners on the line of said streets, and the great benefits derived by other of said property owners on the line thereof by reason of said grade, the said ordinance and the said charter of said city impose like burdens on each, irrespective of damage or benefit, and the plaintiffs here urge to the court that the provisions of said charter which authorized the passage of said ordinance, and impose the unequal and unjust burden upon them and others similarly situated, are inoperative and unconstitutional, and the acts and proceedings of the

said defendants thereunder are void. But notwithstanding the fact, of which the said defendants have been repeatedly advised, the said defendants, the city of Omaha, its officers and agents, are taking the steps pointed out by said charter to enforce the payment of said tax and assessment, not only upon the said property as aforesaid, but they have authorized a warrant to be drawn upon the treasury of said city to pay the said E. F. the sum of \$3120.00, under and by the terms of the said contract, out of the general fund of the said city of Omaha. That said St. Mary's avenue, as laid out, is but sixty-six feet in width; that, at a point near the intersection of Seventeenth street, for a distance west for nearly three hundred feet, at a point covering the entire frontage of the property of said Rhodes, said street is filled to such a height, the lower edge of the fill only reaching the outside of the street, that said street is not, on top, more than 30 feet in width. That at no point on the line of said streets west of the property of the plaintiff O'Neill, on the south side of said streets, and from Seventeenth street west to Twentieth street, on the north side of said streets, is it possible for the property owners thereon to build walks, in consequence of the fills and embankments thereby caused, without first erecting frameworks or other expensive supports for the said walks; while on other parts of said streets, and especially in front and in the immediate vicinity of the property of said councilman, the said street is brought nicely to grade the whole width thereof, rendering the expense for sidewalks probably very light. That most of the plaintiffs had, before the grading of said street, laid sidewalks in front of and adjoining their said property, which have been destroyed by said grading, and are obliged by the terms of said city charter to build and maintain the said walks in conformity to said grade. That said contract between said parties aforesaid required the said E. F. to grade the said streets to the full width; but notwithstanding said requirements and the duty of said city to enact the same, he, the said E. F., has failed and neglects to so grade said streets, and said streets are not fully graded as required by the law in that regard, requiring the removal, as well as filling, large quantities of earth, in many instances in cutting off at least from three to

to twelve feet, and the filling of earth from four to sixteen feet, in order to bring said streets to the grade as established by said ordinance and said specifications, and costing at least the sum of from \$3000.00 to \$4000.00 to complete the same, but the said city and its officers have accepted the said grade at the hands of the said E. F. and now propose paying therefor as before stated. That none of the injustice and inequality of the said tax and assessment, nor the unconstitutional character thereof, appears upon the face of the proceedings under which the tax and assessment is attempted to be levied and collected. The plaintiffs further urge that the said city, its officers and agents, will, unless restrained by the order and injunction of this court, proceed to levy and collect such special assessment upon and out of said property of plaintiffs and others similarly situated, and issue to the said E. F. its said warrant for the sum of \$6240.00 payable by the treasurer of said city, one-half out of the general fund of said city and one-half out of the special fund derived from the payment of said unequal and unjust assessment as aforesaid, thereby causing plaintiffs great and irreparable injury, creating and casting a cloud upon plaintiffs' said lots and lands and others similarly situated, causing a great multiplicity of suits and long and vexatious litigation.¹

Wherefore, etc.

BRIGGS & AMBROSE, *Attorneys.*

NO. 311.

*To Have a Tax Deed Declared Void for Want of Authority in Treasurer to sell,
and to permit Plaintiff to Redeem.*

1. The plaintiff complains of the defendant for that on the day of March, 18..., and from thence hitherto, the plaintiff was and is the owner of the following described real estate, viz.: [*describe land*], and that plaintiff during all that time was a *bona fide* resident of county, Nebraska, and was possessed of personal property therein to the value of \$.....

2. In the years 18..., 18..., and 18..., the clerk of said county made out the tax roll for each of said years, and placed thereon

¹The above is the petition in *Hurford v. City of Omaha*, 4 Neb., 336. The subject is not free from difficulty and for that reason I have given the entire petition omitting certain names. In an ordinary case it can be condensed.

said real estate of plaintiff, as well as said personal property, for taxation, and did place and charge against said parcels of real estate for each of said years taxes as follows:

18..., the sum of \$.....,

18..., the sum of \$.....,

18..., the sum of \$.....,

and charged against the personal property of plaintiff for each of said years as follows:

18..., the sum of \$.....,

18..., the sum of \$.....,

18..., the sum of \$.....

3. On the day of, 18..., the treasurer of county, without authority of law, and without having published a notice of the sale thereof as required by law, proceeded to sell plaintiff's said real estate for the delinquent taxes for the years 18..., 18..., and 18..., and sold the same to, for the sum of \$....., and delivered certificates of purchase of said land to the aforesaid purchaser.

4. Afterwards, on the day of, 18..., one, then treasurer of said county, upon the presentation of said certificates and demand by said, purchaser, issued and delivered to him a treasurer's deed for said land under said pretended sales.

5. The plaintiff alleges that although said real estate was listed by the plaintiff in his own name, yet said treasurer advertised and sold the same as non-resident lands, although the plaintiff was residing thereon at the time of said assessment and sale, and said treasurer well knew at the time of said advertisement and sale that said lands were owned and listed by the plaintiff.

6. Said treasurer failed and neglected to demand said tax of the plaintiff after the same became delinquent, and neglected to collect the same out of the personal property of the plaintiff as required by law, although the plaintiff had sufficient personal property in said county out of which to collect the same.

7. On the day of, 18..., the plaintiff tendered to said [*tax purchaser*] the amount paid by him in purchasing said lands with 12 per cent interest thereon, which he refused, and

the plaintiff now offers to pay the taxes justly chargeable against said land with interest at twelve per cent.

8. The plaintiff therefore prays that said tax deeds may be set aside and be declared null and void, and that plaintiff may be permitted to pay his lawful taxes with twelve per cent interest thereon, and that the cloud cast upon plaintiff's title to said real estate by reason of said deeds may be removed, and such other relief as is just and equitable.¹

NO. 312.

To Enjoin the Collection of Illegal Taxes.

The said plaintiff, the Union Pacific Railroad Company, comes and complains of the defendants, the Board of County Commissioners of Buffalo county, and for cause of said complaint says:

I. The said plaintiff is a corporation duly organized under an act of congress of the United States, and that said plaintiff now is and for three years last past and more has been the owner of a large amount of property, both real and personal, situated and taxable in said Buffalo county, and that it brings this suit as well in its own behalf as on behalf of all other tax payers similarly situated who may come in and contribute to the expense of this suit.

II. The county of Buffalo aforesaid is a duly organized county under the laws of the state of Nebraska, Simon C. Ayer aforesaid is the county clerk thereof, and James Van Sickel is the duly elected and qualified treasurer of said county.

III. The board of county commissioners aforesaid during the years of 1876 and 1877, and after the entire levy for each respective year had been exhausted, audited and allowed a large number of accounts or claims against said county, chargeable against the various funds of said county, amounting to the sum of \$22,000.00, and the county clerk of said county issued his certificates of such auditing and allowance, a copy of one of which, except in date, amount, and party to whom issued, is hereto annexed, marked "Exhibit A," and made a part hereof.

IV. Among the taxes levied July 7th, A.D. 1878, by said county

¹The above is the substance of the petition in the case of *Pettit v. Black*, 8 Neb., 52.

commissioners, and which now on the assessment rolls stand charged for this year, is a tax designated as "county sinking fund" tax of five mills on the dollar valuation of the property of said county; that said tax was levied to pay the audited accounts or certificates aforesaid, and for no other purpose.

V. On the 2d day of July, A.D. 1878, the board of county commissioners aforesaid ordered twenty-five per cent of said certificates or audited accounts to be paid by warrants drawn on the county sinking fund of the county aforesaid, and that the same be paid equally to all holders of said certificates or audited accounts, except such as have been allowed for rebate of taxes, and the said county clerk was ordered to draw the same. A true copy of said order is hereunto annexed, marked "Exhibit B," and made a part hereof.

A warrant for a large sum was then drawn upon the said county sinking fund for the purposes aforesaid, but what exact amount plaintiff has not been able to ascertain and cannot state, leaving unexpended in said fund the sum of \$6035.23, and there is now on hand in the treasury of said county the sum of three thousand eight hundred and forty-nine dollars and forty-seven cents in said fund.

VI. On the 5th day of May, 1879, the board of county commissioners aforesaid ordered said clerk to draw warrants upon the county treasurer of said county for all moneys in the county sinking fund of said county aforesaid in his hands for payment pro-rata on all outstanding certificates or audited accounts aforesaid against Buffalo county, except those allowed for rebate of taxes. A true copy of said order is hereunto annexed, marked "Exhibit C," and made a part hereof.

The county clerk aforesaid has not drawn the warrants as directed, and yet the order now stands in full force and effect upon the records of said county.

VII. There now stands wrongfully charged on the tax rolls of said Buffalo county and against the property of said plaintiff for the county sinking fund of 1878 aforesaid, the sum of \$2572.69, which tax is now due and payable.

Plaintiff further represents that unless the defendants are restrained by injunction they will proceed to advertise and sell

said real estate of plaintiff's. That the levy of taxes for the year 1878, made by the board of county Commissioners for Buffalo county for state, county, school, and other taxes, was as follows:

For state general fund.....	4 mills
“ “ sinking “	1 “
“ “ school “	1 “
“ “ university “	$\frac{3}{8}$ “
“ county general “	10 “
“ “ sinking “	5 “
“ Kcarney special “	15 “
“ county bridge “	5 “
“ “ special “	7 “

all of which were charged against your petitioner and other tax payers as a valid and just tax for the said year 1878; that your petitioner has paid all of said taxes so charged and levied against it and its property for the year 1878, except the said so-called “sinking fund” levy, which said levy petitioner submits is illegal and void, and ought to be enjoined and cancelled by the court. Plaintiff therefore prays that a temporary injunction may be granted restraining said defendants as follows:

1st. That Simon C. Ayer, county clerk aforesaid, be restrained from drawing and attesting, and the chairman of said board of commissioners from signing any warrant or warrants upon the county sinking fund of said county for the year 1878 in payment of the certificates or audited accounts aforesaid, or for the payment of any outstanding debts of the county whatever.

2d. That said board of county commissioners be restrained from ordering drawn or signing any warrant or warrants upon the county sinking fund for 1878 aforesaid, in payment of the certificates or audited accounts aforesaid or any part thereof; or for the payment of any outstanding indebtedness of the county whatever.

3d. That said board of county commissioners be restrained from auditing any claim against said county or from issuing certificates for the same after the levies for the respective years have been exhausted.

4th. That James Van Sickel, county treasurer of said Buffalo county, be restrained from paying any warrant or warrants upon

the sinking fund of said county for the year 1878 aforesaid that have heretofore been or may hereafter be drawn upon said sinking fund in payment of the certificates or audited accounts aforesaid, or in payment of any outstanding indebtedness of said county whatever, except it be in payment of bonded indebtedness of said county or the interest of the same.

5th. That James Van Sickel, treasurer as aforesaid, be enjoined from collecting the county sinking fund tax for the year 1878 aforesaid or any part thereof, and that upon the final hearing of this cause it may be adjudged and decreed that the temporary injunction granted in this case may be made perpetual, that said county sinking fund tax be declared illegal and void, and for such other and further relief as equity may require.¹

A. J. POPPLETON,

Attorney for Plaintiff.

No. 313.

To Enjoin a Railway Company from Using the Right of Way Condemned by its Assignor where the Damages have Not been Paid.

1. The plaintiff complains of the defendant for that at the time hereinafter mentioned the plaintiff was and now is the owner in fee of the following described real estate, viz.: [*describe premises*].

2. On or about the day of, 18..., the B. and S. W. R. R. Co., a corporation duly organized under the laws of the state for the purpose of constructing a railroad from to, located its line over said land, and appropriated for said railroad the right of way through and over said land, without the consent of plaintiff, the damages assessed by the commissioners being the sum of \$.....

3. The plaintiff appealed to the district court from the assessment of damages by said commissioners, and recovered a judgment for said right of way against said B. & S. W. R. R. Co. for the sum of \$..... and costs of suit, which judgment still remains in full force and is unpaid.

4. The B. & S. W. R. R. Co. did not deposit the amount of

¹ The above is the petition in the case of the *U. P. R. R. Co. v. Buffalo County*, 9 Neb., 449.

damages allowed plaintiff for said right of way by said commissioners, or any other sum in the probate court of county or elsewhere, nor did they pay or offer to pay said judgment.

5. On or about the day of, 18..., said B. & S. W. R. R. Co. sold and assigned all its right, title, and interest in said railroad and right of way to the defendant, and said defendant thereupon completed said railroad through and over said land of plaintiff, and has ever since operated the same across said land.

6. On the day of, 18..., the plaintiff demanded payment of said judgment for damages for said right of way from the defendant, but said defendant refused to pay the same or any part thereof.

No part thereof has been paid or deposited, and there is now due thereon to the plaintiff the sum of \$.....

The plaintiff therefore prays that said railroad company be perpetually enjoined from using the right of way over the aforesaid lands or operating their railroad over the same, unless they pay said judgment with interest and costs, and for such other relief as is just and equitable.¹

NO. 314.

To Restrain Infringement of Trade Mark, and for Damages.

1. The plaintiff complains of the defendant for that the plaintiff is, and ever since the day of, 18..., has been, the manufacturer of an article known as [*give name*], which he has sold [*in bottles, packages, etc.*], properly labeled with the following device and trade mark adopted by the plaintiff in the year 18....., viz.:

[*Copy label.*]

2. By reason of the experience and care of the plaintiff in said business and the excellence of said article, it had acquired a wide reputation as a useful article, and had an extensive sale, from which the plaintiff realized large profits.

3. Such article is known to the public and to buyers and

¹ The above is the substance of the petition in the case of *Ray v. A. & N. R. R.*, 4 Neb., 439, following *O. & N. W. R. R. v. Menk*, Id., 21.

consumers thereof as, and by the aforesaid device and trade mark of plaintiff.

4. The defendant, well knowing of the existence of said trade mark and of plaintiff's rights therein, but wilfully disregarding the same, in the year 18... wrongfully and unlawfully prepared, offered for sale, and now offers for sale at and other places an imitation of the plaintiff's article, which he has put up in similar packages, and labeled with a similar label, of which the following is a copy :

[*Copy label.*]

5. Said imitations and counterfeits are well calculated to mislead and deceive purchasers of the plaintiff's article and the public, and do deceive and induce many of them to purchase said article sold by the defendant, in the supposition that it is the article prepared and sold by the plaintiff, thereby greatly diminishing plaintiff's said business and profits.

6. The said imitation of plaintiff's said article, prepared and sold by the defendant, is a greatly inferior article to that of plaintiff, by reason whereof the reputation of said article of plaintiff has been greatly injured, to the damage of plaintiff.

7. The plaintiff has sustained damages by reason of said wrongful acts of the defendant in the sum of \$.....

The plaintiff therefore prays that said defendant, his agents, and servants, may be enjoined from preparing, selling, or offering for sale such imitation of plaintiff's article, or any imitation of the same, or any imitation of the label and trade mark of the plaintiff, and for his said damages and costs.

NO. 315.

To Enjoin Late Partner from Continuing Business after Dissolution of Partnership.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff and defendant executed under their hands articles of co-partnership, and thereby entered into partnership for the purpose of carrying on the business of, at No. ... street, in the city of

2. Said partnership continued until the day of, 18..., when it was dissolved by mutual consent.

3. By said articles of co-partnership it was expressly stipulated and agreed that in case of a dissolution of the firm neither of the partners should continue or carry on business in the store occupied by the firm unless by consent of the other.

4. Said defendant, in violation of said agreement, has rented the store occupied by the late firm, and is about to carry on said business therein without the consent and against the objections of plaintiff.

5. The plaintiff has duly performed all the conditions of said agreement on his part, and is endeavoring to carry on said business at No. street, in said city, but by reason of the aforesaid wrongful acts of the defendant is unable to do so because [*state particularly the injury threatened or sustained*]. The acts complained of are a continuing injury to plaintiff's business, and cannot be fully compensated in damages.

The plaintiff therefore prays that the defendant and his agents may be restrained from carrying on said business in the store formerly occupied by said firm, or from advertising or announcing that such is his place of business, and for such other relief as is just and equitable.

No. 316.

By Purchaser of Physician's Good-will, to Enjoin him from Continuing the Practice.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff and defendant both were practicing physicians and surgeons, said defendant practicing in county and vicinity.

2. On said day the defendant, in consideration that the plaintiff would purchase from him his drug store and the good-will of his practice and business for the sum of \$....., agreed with the plaintiff that he would immediately cease to practice medicine or do business in said county.

3. The plaintiff thereupon purchased said drug store and the good-will of said practice and business upon the terms and conditions aforesaid, and paid therefor to the defendant the sum of \$.....

4. The plaintiff then commenced the practice of a physician

and surgeon in said county, and still continues said practice therein.

5. The defendant, in violation of his said agreement, did on the day of, 18..., commence again to practice as a physician and surgeon in said county, and has ever since continued to practice as such therein, to the great damage of the plaintiff.

6. The plaintiff has duly performed all the conditions of said agreement on his part.

The plaintiff therefore prays for a temporary order of injunction restraining the defendant from practicing as a physician and surgeon in said county until the final hearing of the cause, and that on the final hearing of the cause said injunction may be made perpetual, and that an account may be taken of the damages sustained by plaintiff by reason of the violation of said agreement by the defendant, and judgment rendered in his favor for that amount, and for such other relief as is just and equitable.

NO. 317.

To Restrain Waste and for Damages.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was and still is the owner in fee of the following described lands, viz.: [*describe lands*].

2. On said day the plaintiff and defendant made a lease in writing under their hands, by which the plaintiff leased said premises to the defendant for a term of years, at a yearly rent of \$.....

3. Said lease contained a covenant, of which the following is a copy:

[*Copy covenant against waste.*]

4. On the day of, 18..., said defendant entered into possession of said premises under said lease, and is still in possession thereof as tenant of plaintiff.

5. On or about the day of, 18..., the defendant wrongfully cut down twenty large apple trees and ten large walnut trees on said premises belonging to plaintiff, and has otherwise greatly injured the same, to the damage of the plaintiff in the sum of \$.....

6. The defendant threatens and is about to [*state what particular acts of waste are about to be committed*].

The plaintiff therefore prays for a temporary order of injunction restraining the defendant from [*state acts to be enjoined*] until the final hearing of the case, and that upon such final hearing said injunction may be made perpetual, and that the plaintiff recover from the defendant the sum of \$....., his damages in the premises, and for such other relief as is just and equitable.

No. 318.

To Restrain a Nuisance by Noise.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff purchased the dwelling-house known as street, in the city of, and since that time has resided and still resides therein.

2. In the year 18... the defendant purchased lot, in block, in said city, adjoining the residence of plaintiff, and erected thereon an iron foundry and put a steam trip-hammer therein, which he has used and still uses constantly during the day time for the purpose of hammering iron.

3. Said trip-hammer makes so loud a noise while being operated that it is impossible to hear ordinary conversation in plaintiff's house, and thereby causes great inconvenience and discomfort to plaintiff and his family.

4. On the day of, 18..., the plaintiff notified the defendant that the noise arising from the use of said trip-hammer was so great as to cause plaintiff and his family great inconvenience and discomfort, and requested him to discontinue the use of the same, which he refused to do.

The plaintiff therefore prays for a temporary order of injunction restraining said defendant from using said trip-hammer in said foundry until the final hearing of the case, and that on such final hearing said injunction may be made perpetual, and for such other relief as is just and equitable.

No. 319.

To Restrain Nuisance by Maintenance of a Slaughter-house.

1. [*As in preceding form.*]

2. In the year 18... the defendant purchased lot ..., in block ..., in said city, adjoining the residence of plaintiff, and erected thereon a slaughter-house, and from that time until the present has caused cattle, sheep, and swine to be brought and killed there.

3. A stench arises from said slaughter-house by reason of the animals killed therein and the blood and offal therefrom, which is so offensive as to render said dwelling-house of plaintiff uninhabitable.

The plaintiff therefore prays, etc.

No. 320.

For the Re-delivery of Goods Left in Pledge, and for an Injunction.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant loaned to the plaintiff the sum of \$500, payable in six months, with interest thereon.

2. To secure the payment of said sum the plaintiff deposited with the defendant one piano forte of the value of \$500, and a gold watch of the value of \$200, and made and delivered to him an absolute bill of sale of said property.

3. At the time of making said deposit and bill of sale it was agreed between the plaintiff and defendant that they were merely to secure the payment of said loan with interest.

4. On the day of, 18..., the plaintiff tendered to said defendant the sum of \$525, being the amount of principal and interest due on said loan, and requested the re-delivery of said property, which was refused.

5. The defendant threatens and is about to sell said property, claiming that he is the owner thereof under said bill of sale, and refuses to deliver the same to plaintiff.

6. The plaintiff has been at all times since said tender, and now is, ready to pay said sum of \$500, with interest thereon, and now brings the money into court to abide its order in the premises.

The plaintiff therefore prays that said defendant may be enjoined from selling or disposing of said property, and that the same may be re-delivered to plaintiff upon his paying the amount of said loan and interest, and for such other relief as is just and equitable.

No. 321.

To Prevent Threatened Injury to Personal Property, and for its Restoration.

1. The plaintiff complains of the defendant for that on the day of, 18..., he was and now is the owner of the following described personal property [*describe property*] [*state*

facts showing that the property is of such a character that it cannot be replaced by money, such as a valuable painting, of which no duplicate exists, etc.]

2. On the day of, 18..., the defendant, being engaged in the business of, and being possessed of a fire-proof vault, the plaintiff deposited said with the defendant for safe keeping in said vault, the defendant promising to return the same to plaintiff on demand.

3. On the day of, 18..., the plaintiff demanded said of defendant, and offered to pay all reasonable charges for taking care of the same, but the defendant then refused and still refuses to deliver the same to plaintiff.

4. Said defendant threatens and is about to dispose of said unless restrained by the order of the court.

5. Said is of the value of \$....., but pecuniary damages will be no adequate compensation to plaintiff for the loss of the same.

The plaintiff therefore prays for an order of injunction restraining the defendant from disposing of said, and that he be required to return the same to plaintiff, and for such other relief as is just and equitable.

No. 322.

Interpleader.

1. The plaintiff complains of the defendant for that on the day of, 18..., one John Williams deposited with the plaintiff a United States ... per cent coupon bond No., payable to bearer on the day of, 19...

2. On the day of, 18..., the defendant, Henry Parker, informed the plaintiff that he was the owner thereof, under an assignment of said Williams, and demanded possession of the same from plaintiff.

3. At the same time the defendant, William Jones, informed the plaintiff that he was the owner of said bond under an assignment from said Williams, and demanded said bond from plaintiff.

4. The plaintiff has no interest in said bond and is ready to deliver the same to the person entitled thereto, but he is entirely ignorant of the rights of the respective parties therein.

5. Each of said defendants is threatening and is about to sue the plaintiff to recover said bond, and will do so unless restrained by the order of the court.

6. This action is not brought at the instance of or in collusion with either of said defendants.

The plaintiff therefore prays that said defendants may be enjoined from instituting proceedings against the plaintiff to recover said bond, and that they may be required to interplead together for the purpose of determining their respective claims to the same, and that upon delivering the said bond to the party adjudged by the court to be entitled to the same, the plaintiff may be discharged from all liability therein to any of said defendants.

NO. 323.

Judgment Creditor v. Judgment Debtor and Fraudulent Grantee.

1. The plaintiff complains of the defendant for that the plaintiff, at the, 18..., term of the district court of county, recovered a judgment against C. D., defendant, for the sum of \$....., which judgment still remains in full force and is unsatisfied.

2. On the day of, 18..., the plaintiff caused an execution to be issued out of said court against the property of said C. D., which execution, on the day of, 18..., was by the sheriff of said county returned wholly unsatisfied, and there is now due to the plaintiff on said judgment the sum of \$.....

3. The said defendant C. D. is wholly insolvent and has no property whatever liable to execution to satisfy the same.

4. On the day of, 18..., said C. D. conveyed the following described premises, viz.: [*describe premises*], to G. H., defendant, without consideration and for the purpose of hindering and defrauding the plaintiff and other creditors of said C. D., as said G. H. then well knew.

The plaintiff therefore prays that the deed of conveyance from C. D. to G. H. may be declared null and void, and that said premises may be ordered sold as required by law, and the proceeds thereof applied to the payment of plaintiff's judgment, and for such other relief as is just and equitable.

No. 324.

Upon the Judgment of a Justice of the Peace.

1. [As in preceding form, changing it to conform to the facts.]
2. On the day of, 18..., a transcript of said judgment was duly filed and docketed in the office of the clerk of the district court of county.
[Continue as in preceding form.]

No. 325.

Against Judgment Debtor and One to whom He Fraudulently Confessed Judgment to Set Aside Judgment and Sale Thereunder.

- 1, 2, and 3. [As in No. 323.]
4. On the day of, 18..., before the entry of plaintiff's judgment, but after the indebtedness upon which it was rendered had accrued, said defendant C. D. authorized two judgments for \$500 each to be entered against him by confession in the county court of county, in favor of G. H., defendant, upon a pretended indebtedness for money alleged to have been loaned by G. H. to C. D.
5. On the day of, 18..., transcripts of said judgments were duly filed and docketed in the office of the clerk of the district court of said county.
6. On the day of, 18..., executions were duly issued out of the said district court on said judgments, which, for want of goods and chattels of said C. D. whereon to levy, were duly levied upon the following described real estate belonging to said C. D., viz.: [*describe premises*], which were sold to said G. H. for the sum of \$....., and that amount thereof credited on said judgments.
7. Said sale was afterwards reported to said court, and the same was confirmed, and a deed therefor made to said G. H.
8. Said judgments were fraudulently confessed by said defendant C. D. to said G. H., for the sole purpose on the part of both of covering up the property of said C. D. and defrauding the plaintiff. Said C. D. was not indebted to G. H. in any sum whatever at the time of the confession of said judgments, and there was no consideration whatever for the same.

The plaintiff therefore prays that said judgments may be declared fraudulent and void as to creditors, and that a receiver may be appointed by the court, to whom said defendants shall be directed to convey said real estate, and who shall be directed to sell the same and apply the proceeds, or so much thereof as may be necessary, to the payment of the plaintiff's judgment, and for such other relief as is just and equitable.

No. 326.

Against Debtor to Reach Money Due Him from Third Persons.

1. The plaintiff complains of the defendant for that at the, 1878, term of the district court of county the plaintiff recovered a judgment against the defendant for the sum of \$..... which is still in full force.

2. On the day of, 18..., an execution was duly issued on said judgment and delivered to the sheriff of said county, who, on the day of, 18..., returned the same wholly unsatisfied.

3. After said indebtedness of defendant to plaintiff had been incurred, and on or about the day of, 18..., the defendant engaged in mercantile business in the city of, and, as plaintiff is informed and believes, has at this time debts from solvent debtors due him to about the amount of \$....., evidenced by charges on his books of original entries, which he refuses to produce, and the plaintiff is therefore unable to specify more particularly the amounts of said indebtedness and the names of the persons from whom the same is due.

4. There is due from said defendant on said judgment the sum of \$....., and he has no property subject to execution.

The plaintiff therefore prays that said defendant be required to produce said books of original entries, and that a receiver may be appointed to receive the same and the effects of said defendant, and that said defendant be enjoined from selling or assigning any portion thereof, and that said receiver collect said accounts and apply so much of the proceeds as may be necessary to the payment of said judgment and costs, and for such other relief as justice and equity may require.

No. 327.

To Set Aside a Transfer from a Debtor to a Third Person for Note of Third Person.

1 and 2. [*As in preceding form.*]

3. On the day of, 18..., said [*judgment debtor*] was engaged in selling lumber at, and was possessed of about feet of lumber of all kinds, of the value of about \$....., but was and is insolvent and unable to pay his creditors in full.

4. On said day said [*judgment debtor*], for the purpose of defrauding his creditors, made a pretended sale of said lumber to E. F., taking his promissory notes therefor, said E. F. well knowing that the object of said [*judgment debtor*] in selling said property was to hinder, delay, and defraud his creditors.

5. Said E. F. is wholly insolvent and has no means with which to pay said notes, except such as he may derive from the sale of said lumber.

6. Said judgment remains wholly unpaid, and there is due thereon from the [*judgment debtor*] to the plaintiff the sum of \$.....

7. The property so assigned to said is of the value of about \$.....

The plaintiff therefore prays that said assignment and transfer of said lumber to E. F. may be declared fraudulent and void as against the plaintiff, that a receiver may be appointed to take charge of said lumber and sell the same, and out of the proceeds thereof pay said judgment and costs, and that until the final hearing in this cause said defendants, and each of them, be enjoined from selling or disposing of said lumber, or any part thereof, and for such other relief as justice and equity may require.

No. 328.

Against Judgment Debtor, his Assignee, and a Pretended Creditor to Set Aside an Assignment.

1 and 2. [*As in No. 326.*]

3. On the day of, 18..., and after the recovery of said judgment, the defendant [*judgment debtor*] assigned all his property, of about the value of \$....., to C. D., in trust for the payment of his debts.

4. Said [*judgment debtor*] is not indebted to E. F., one of the creditors mentioned in said assignment, in any sum whatever, and his claim for the sum of \$..... is fictitious, and is inserted merely for the purpose of enabling the [*judgment debtor*] to retain a large portion of the proceeds of the sale of said property.

5. The whole amount of *bona fide* claims against said [*judgment debtor*] amount to about the sum of \$.....

6. Said assignee had full knowledge of the fraudulent character of said assignment at the time he accepted said trust, and has collected money and other property from the assets of said assignor, of the value of \$.....

7. Said [*judgment debtor*], has no other property than that included in said assignment, and the same was made by the defendant [*judgment debtor*] with the intent to hinder, delay, and defraud creditors, and he still retains possession of said property under a pretence that he is the agent of said C. D.

8. No part of said judgment has been paid, and there is due thereon from the defendant to the plaintiff the sum of \$.....

The plaintiff therefore prays that said assignment may be declared fraudulent and void, and that said defendants may be required to account for all of said property received by them, and that a receiver may be appointed to take possession and dispose of said property and apply the proceeds thereof, or so much as may be necessary, to the payment of plaintiff's judgment, and for such other relief as justice and equity may require.

NO. 329.

By Creditor v. Executrix of Deceased Debtor.

1. The plaintiff complains of the defendant for that one C. D. in his life-time was indebted to plaintiff in the sum of \$..... for and on account of [*state nature of indebtedness*], which sum still remains due and unpaid.

2. On the day of, 18..., said C. D. departed this life, having first duly made and published his last will and testament in writing, bearing date the day of, 18..., and thereby gave and bequeathed all his estate and effects to his wife, E. D., and appointed her executrix of said last will and testament, and especially providing that she should not be required to give bond with security as such executrix.

3. On the day of, 18..., said will was duly admitted to probate in the county court of county, and letters testamentary were thereupon granted by said court to said E. D., without requiring her to give bond with security as required by law, and she thereupon took upon herself the burden of the execution thereof.

4. On the day of, 18..., the plaintiff duly filed his account in the county court of county, and the same was then duly allowed to the amount of \$..... against said estate of C. D., deceased, as a debt of the second class, no appeal being taken by either party.

5. Immediately after said will was admitted to probate and the issuing of said letters testamentary, said E. D. took possession of the estate and effects of said testator, of the value of \$....., and has converted the same to her own use, although much more than sufficient to satisfy all demands against said estate, and refuses to pay the plaintiff said claim, or to apply the effects of said estate to the payment of said debt.

6. No part thereof has been paid, and there is now due thereon from said estate to the plaintiff the sum of \$....., with interest from the day of, 18...

[*Prayer.*]

NO. 330.

By Partner v. Co-partner, Praying for Dissolution of Co-partnership on account of Defendant's Misappropriation of Funds.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the plaintiff entered into an agreement in writing with said defendant to form a partnership with him in the business of, the terms of said agreement being in substance as follows: [*state substance of agreement.*]

2. The plaintiff and defendant then entered upon and have since carried on said co-partnership business under said agreement.

3. During the existence of said partnership the defendant has from time to time applied to his own use large sums of money belonging to the business of said firm, greatly in excess of the amount to which he was entitled, and has concealed the same from the plaintiff.

4. On or about the day of, 18..., the plaintiff dis-

covered that the defendant was indebted to said firm to a large amount by reason of his misapplication of the partnership moneys to his own use. The plaintiff then requested the defendant to deposit co-partnership moneys that he received in the city bank, where the firm kept its accounts, and draw therefrom such sums as were needed by said co-partnership, but said defendant refused to comply with said request, and has continued to apply said moneys to his own use, thereby greatly increasing his indebtedness to said co-partnership.

5. The defendant has received the sum of \$..... in excess of his proportion of the profits of the co-partnership, and continues to collect moneys belonging to said firm and apply the same to his own use.

The plaintiff therefore prays that said co-partnership may be dissolved, and that an account may be taken of the moneys received by the plaintiff and defendant respectively during the existence of said co-partnership, and that the property of said firm of every kind may be sold and the proceeds thereof applied—first, to the payment of the debts and liabilities of said firm, and second, the remainder to be divided between the plaintiff and defendant according to their respective interests therein, and that the defendant may be enjoined from intermeddling with the debts, moneys, property, or effects of said firm, and for such other relief as justice and equity may require.

NO. 331.

By Partner v. Co-partner, for Dissolution and Accounting where no Date is Fixed for Termination of Partnership.

1 and 2. [*As in preceding form.*]

3. The plaintiff intends engaging in other business, and desires to dissolve said co-partnership and close up its affairs, and on the day of, 18..., notified said defendant in writing of his intention to do so, and requested the defendant to consent to a dissolution of said co-partnership and a settlement of all partnership accounts, which he refused to do.

4. The debts due and owing by said partnership amount to about the sum of \$.....; and the assets, including the stock of goods, good-will, and lease of the store, amount to about the sum of \$..... And as an equitable division of said assets can-

not be made it is for the interest of the parties that the same be sold and the proceeds thereof divided.

No. 332.

Where an Assignment is Made by One of the Partners.

1 and 2. [*As in No. 330.*]

3. On the day of, 18..., the defendant [*co-partner*], without consulting the plaintiff, and without his knowledge or consent, assigned all his right, title, and interest in said partnership and in the property belonging to said firm to one C. D., and thereby dissolved said partnership.

4. [*As in No. 330.*]

No. 333.

Exclusion of the Plaintiff.¹

1 and 2. [*As in No. 330.*]

3. On the day of, 18..., the defendant [*co-partner*], in violation of said agreement, took exclusive possession of the partnership stock and effects, and then refused and still refuses to permit the plaintiff to have access to the books or business of said firm, but has entirely excluded him therefrom.

4. [*As in No. 331.*]

No. 334.

Insolvency of Co-partner.

1 and 2. [*As in No. 330.*]

3. On the day of, 18..., the defendant [*co-partner*], in violation of said agreement, signed a note for the sum of \$...... as surety for one E. F., who was and is insolvent. Judgment was recovered on said note for the sum of \$......, on the day of, 18..., on which an execution in due form was issued, and levied upon all the individual estate, real and personal, of said [*co-partner*], which estate was, on the day of, 18..., sold for the sum of \$......, and there is still due from said [*co-partner*] on said judgment the sum of \$......, and said defendant is insolvent and unable to pay the same.

4. [*As in No. 331.*]

¹ See *Sheppard v. Boggs*, 9 Neb., 257.

No. 335.

By Administrator of Deceased Partner against the Survivor for an Account.

1. [As in form 330, substituting decedent's name for plaintiff's.]

2. Said [decedent] and defendant then entered upon and continued said partnership business under said agreement until the time of the death of said [decedent], which took place on the day of, 18...

3. On the day of, 18..., the plaintiff was duly appointed by the county court of county administrator, and thereupon duly qualified as the administrator of the estate of said, deceased, and is discharging the duties of said office.

4. At the time of the death of said the said partnership assets were as follows:

The stock of goods in the store No. ... street,,	
of the value of.....	\$.....
Real estate, to-wit: lot ..., in block, in the city of	
....., with the appurtenances, of the value of.....	\$.....
Book accounts and notes of the value of.....	\$.....
Cash.....	\$.....

Amounting in the aggregate to the sum of..... \$.....

5. The debts and liabilities of said firm at the time of the death of said amounted to about the sum of \$.....

6. That, deducting bad and doubtful debts, the value of the assets of said firm at the time of the death of said was not less than \$

7. Said [decedent], during the continuance of said partnership, advanced the sum of \$..... towards the capital stock of said firm.

8. Since the death of said the defendant has retained the possession of all the real and personal property of said partnership, and has continued to carry on said business and sell goods, collect debts, and pay the debts of said firm out of the proceeds thereof, and has collected large sums of money belonging to said firm, but the amount of which the plaintiff cannot state.

9. The defendant has not paid to plaintiff any part of the proceeds of said sales, nor has he transferred and delivered to him any of the assets or other property of said co-partnership, except [state what has been delivered].

10. On the day of, 18..., the plaintiff requested of the defendant a statement and account of said partnership business and transactions, which he refused to give, and also refused to settle up the affairs of said co-partnership in the manner specified in said agreement.

The plaintiff therefore prays that an account may be taken of said co-partnership business from the commencement thereof until terminated by the death of said, and of the moneys received and paid by said partners respectively in regard to said business, and that said defendant may account to the plaintiff for all the property, assets, and effects of said firm since its dissolution by the death of said, and that said defendant pay plaintiff whatever may be found due upon said accounting, that a receiver of the property and good be appointed with power to sell the same, and that until the final hearing in this cause the defendant be enjoined from collecting the partnership debts, and for such other relief as justice and equity may require.

No. 336.

By Judgment Creditor of Firm for Payment of Partnership Debt out of Partnership Property.

1. The plaintiff complains of the defendants for that on the day of, 18..., the defendants were partners carrying on the business of at

2. Said partners continued to carry on said business until the day of, 18..., when said partnership was dissolved by mutual consent, the defendant E. F. retaining the partnership goods and assuming the payment of the partnership debts.

3. After the dissolution of said partnership the defendant E. F. sold a considerable portion of said goods at auction, and has received and holds the notes of the purchasers therefor to about the sum of \$....., which he is proceeding to collect and apply to his own individual use, and has refused to apply the same to the payment of the partnership debts.

4. At the October, 1878, term of the district court of county the plaintiff recovered a judgment against said co-partners for the sum of \$....., upon a partnership debt, which judgment still remains in full force and is unsatisfied.

5. On the day of, 18..., an execution was duly issued on said judgment against said defendants, and delivered to the sheriff of said county, commanding him to levy the same upon the goods and chattels of the defendants, or either of them, and for want thereof upon the lands and tenements belonging to them, or either of them, which execution on the day of, 18..., was returned wholly unsatisfied.

6. Said defendants have wholly failed to apply said partnership property, or any part thereof, to the payment of said judgment, and since the return of said execution the plaintiff requested the defendant E. F. to apply the proceeds of said partnership property to the payment of said judgment, which he refused to do, but is applying the same to his own individual use.

The plaintiff therefore prays that the defendant E. F. account for the assets and effects of said co-partnership, and the property sold and the moneys received and paid out by him, and that the property and moneys of said firm may be applied to the satisfaction of said judgment, and that a receiver of said partnership property and effects may be appointed, and that said defendants be enjoined from intermeddling with said property or collecting or receiving any of said co-partnership debts, and for such other relief as justice and equity may require.

No. 337.

By Creditor v. Corporation for an Account and to Set Aside a Fraudulent Judgment.

1. The defendants are a corporation duly organized under the general laws of the state of Nebraska, for the purpose of carrying on the business of in said state.

2. At the October, 1878, term of the district court of county the plaintiff recovered a judgment against said corporation for the sum of \$....., which judgment still remains in full force and no part of which has been paid.

3. On the day of, 18..., an execution was duly issued out of said court against said defendant, and delivered to the sheriff of said county, commanding him to levy the same upon the goods and chattels of said corporation, and for want

thereof upon the lands and tenements thereof, which execution, on the day of, 18..., was returned wholly unsatisfied.

3. The defendants,,,,,, are directors of said corporation, and on the day of, 18..., suffered judgment to be recovered against said corporation for the sum of \$....., in favor of, who then was and now is the [*president*] of the same.

4. Said corporation was not indebted to said in any sum whatever, but said judgment was obtained without consideration, and for the sole purpose of covering up the property of said corporation.

5. On the day of, 18..., an execution was issued on said judgment, and was levied upon all the property, real and personal, of said corporation.

6. Said corporation is insolvent, and entirely unable to pay its debts, and has no other property than that levied upon under the aforesaid execution.

7. There is now due from the defendant to the plaintiff on said judgment the sum of \$....., with interest from the day of, 18...

The plaintiff therefore prays that said directors be required to account for the funds and property of said corporation committed to their charge, and for all corporate property acquired by themselves or lost by a violation or neglect of their duty as directors, and that they be required to pay all sums of money found due from them. That a receiver may be appointed to take charge of the property and effects of said corporation, and that said defendants be enjoined from transferring any of the property or effects of said corporation until the further order of the court, and that upon the final hearing said judgment to [*president*] may be set aside, and said property sold, and the proceeds thereof applied to the payment of plaintiff's judgment, and for such other relief as justice and equity may require.

NO. 338.

By Attorney General to Dissolve a Corporation.

1. [*As in preceding form.*]

2. During the year 18... said corporation has, without any

charter or grant from the state, exercised the franchise of, and has [*loaned money, received deposits, and transacted a general banking business*] without warrant or authority of law.

The plaintiff therefore prays that said corporation be deprived of all corporate rights and franchises and be dissolved.

No. 339.

To Deliver up a Note to be Canceled.

1. The plaintiff complains of the defendants, for that on the day of, 18..., the plaintiff made and delivered to the defendant E. F. a promissory note in writing of that date, of which the following is a copy:

[*Copy note.*]

2. The defendant E. F. then indorsed and delivered said note to one G. H. for the purpose of having the same discounted at the First National Bank of, and if the same was so discounted said G. H. was to apply the proceeds thereof to the payment of an account which he then held against the defendant E. F.

3. It was further agreed by and between the plaintiff and both of said defendants that in case said bank would not discount said note the same was to be returned to plaintiff.

4. On the day of, 18..., said G. H. presented said note to said bank for discount, which refused to discount the same.

5. On the day of, 18..., the plaintiff demanded said note of the defendants, but they refused to deliver the same to plaintiff, and still retain possession thereof, and threaten to present the same to some other bank for discount.

6. Said note was made by the plaintiff for the purpose of enabling the said E. F. to have the same discounted at said bank, and not elsewhere, and the plaintiff received no consideration therefor whatever.

The plaintiff therefore prays that said defendants may be required to deliver said note to the plaintiff, and that until the further order of the court they may be enjoined from transferring the same or having it discounted, and for such other relief as justice and equity may require.

No. 340.

*To Set Aside a Contract for Fraud.*¹

1. The plaintiff complains of the defendants for that on the day of, 18..., the plaintiff was the owner in fee of the following described premises, viz.: [*describe premises*], situate in the county of, in the state of

2. On said day the defendant E. F. applied to the plaintiff and stated that he was about to purchase lands in the vicinity of the above described premises, and desired to purchase the same, and thereupon procured from the plaintiff the following proposition:

“KEARNEY, NEB., April 1, 1879.

“I will sell to E. F. the [*describe premises*], for the sum of \$....., one half cash, in five days, and the balance to be paid in equal amounts, in one and two years, with interest, approved security to be given for deferred payments.

“A. B.”

3. Said defendant did not pay the money, as provided in said proposition, or comply with any of its conditions, and on or about the day of, 18..., the plaintiff and defendant by mutual consent abandoned said proposition.

4. Afterwards, and on or about the day of, 18..., the plaintiff contracted to sell an undivided half of said premises to one G. H. for the sum of \$....., lands in that vicinity having become greatly enhanced in value by reason of the construction of a railroad through that portion of the country, and the location of a depot on said land.

5. On the day of, 18..., and after the construction of said railroad and the location of said depot on said land, said E. F. applied to plaintiff and offered to pay him \$....., and give security for the deferred payments, which the plaintiff declined to receive, upon the ground of delay, and that the former proposal had been abandoned.

6. Thereafter, and on or about the day of, 18..., said defendant E. F., in order to defraud the plaintiff, wrote under said proposal these words: “Proposal accepted this

¹ See *Larmon v. Jordan*, 56 Ill., 204.

day of, 18... E. F.," and on the same day assigned the same to I. J. and K. L., who recorded the same in the office of the recorder of deeds of said county, who now claim that the same is a valid contract against the plaintiff.

7. The plaintiff is in possession of said premises, and said proposal and the acceptance written thereunder constitute a cloud upon plaintiff's title to the same, and greatly depreciate the value thereof.

The plaintiff therefore prays that said proposal and acceptance may be declared null and void, and held for nought, and the cloud thereby cast on plaintiff's title to said premises may be removed, and for such other relief as justice and equity may require.

No. 341.

To Set Aside a Deed Obtained by Fraud.

1. [*As in preceding form.*]

2. On said day the defendant applied to the plaintiff to purchase the same, and as the plaintiff resided at the distance of 500 miles from said land and knew nothing of its value, or of the improvements being made in its vicinity tending to enhance the value thereof, he applied to the defendant, who was well acquainted with the same as to its location and the improvements being made in its vicinity. The defendant thereupon informed plaintiff that the land was situate five miles from any settlement, and that he knew of no improvements being made in that vicinity calculated to enhance the value thereof.

3. Relying upon said representations of said defendant the plaintiff sold and conveyed said land to him for the sum of \$.....

4. The plaintiff alleges that at the time said defendant made said representations the settlement extended to said land and the city of, containing three thousand inhabitants, was less than one mile therefrom, and that said premises, at the time of the execution of said deed, were well worth in cash the sum of \$....., of all which said defendant was well aware at the time he made said false and fraudulent representations, but of which plaintiff had no knowledge whatever.

5. As soon as plaintiff discovered that said representations

were false, to-wit: on the day of, 18..., he applied to the defendant and tendered to him said sum of \$....., so paid for said premises, and requested him to re-convey the same to plaintiff, which he refused to do.

6. The plaintiff therefore brings said sum of \$..... into court for the purpose of having the same delivered to the defendant, when he will accept the same, and re-convey the same to the plaintiff.

The plaintiff therefore prays that said defendant be required to re-convey said premises to the plaintiff, and that the title to the same may be quieted and confirmed in plaintiff, and for such other relief as justice and equity may require.

NO. 342.

To Reform a Conveyance by Correcting a Mistake in the Description.

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant, in consideration of the sum of \$..... then duly paid, sold to plaintiff the following described premises, viz.: commencing at the south-east corner of section thirty-six, in township ..., range ..., in county, running thence north forty rods, thence west forty rods, thence south forty rods, thence east forty rods to the place of beginning, containing ten acres.

2. On said day the defendant, under his hand, executed and delivered to plaintiff a deed, intending thereby to convey said premises to plaintiff, but by mistake the description of the premises conveyed by said deed is as follows: Commencing at the south-east corner of section No. 36, in township ..., range ..., in county, thence north forty rods, thence *east* forty rods, thence south forty rods, thence west forty rods to the place of beginning, containing ten acres.

The description in said deed is erroneous in this: that running forty rods north from the south-east corner of said section, the description should be amended by substituting the word "*west*" for "*east*;" it will then conform to the contract of the parties as set forth in the first paragraph of this petition.

4. The plaintiff therefore prays that said deed may be reformed as aforesaid, and that he recover his costs in the premises.

No. 343.

To have a Mortgage Declared Satisfied and a Cloud upon Title Removed, and for Damages.

1. [As in No. 340.]

2. On the day of, 18..., the plaintiff made and delivered to the defendant a mortgage deed upon said premises to secure the payment of two promissory notes of that date, each for the sum of \$....., one note being due and payable on the day of, 18..., and the other on the day of, 18..., which mortgage on said day was duly recorded in the office of the clerk of county.

3. On the day of, 18..., the plaintiff paid said notes in full, and thereupon tendered to said defendant his reasonable charges for discharging said mortgage upon the records of the county, and requested him to acknowledge satisfaction thereof upon said records.

4. More than seven days have elapsed since said tender of plaintiff and request to discharge said mortgage upon the records of said county, but said defendant has entirely failed to discharge the same.

5. Said mortgage is a cloud upon plaintiff's title to said real estate, and the plaintiff has sustained damages by reason of the failure of said defendant to discharge the same in the sum of \$100.¹

The plaintiff therefore prays that said mortgage may be canceled and satisfied of record, and the cloud thereby cast upon plaintiff's title removed, and that he may recover one hundred dollars, his damages so as aforesaid sustained, and for costs.

No. 344.

Specific Performance. Vendor v. Purchaser.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, being the owner in fee of the following described premises, viz.: [*describe premises*], on said day sold the same to the defendant, and entered into an agreement in writing, duly signed, in relation thereto with the defendant. The following is a copy of said agreement:

[*Copy agreement.*]

¹G. S., 877.

2. The plaintiff has duly performed all the conditions of said agreement on his part, and on the day of, 18..., tendered to the defendant a deed of said premises in pursuance of the terms of said agreement, but the defendant refused and still refuses to accept the same and pay said purchase money or any part thereof.

The plaintiff therefore prays that said defendant be required to perform said agreement and pay plaintiff said purchase money, amounting to the sum of \$....., with interest from the day of, 18..., or in case of his refusal to complete said contract, that said premises be sold and the proceeds applied to the payment of the sum due, and in case of a deficiency the defendant be required to pay the same, and for such other relief as justice and equity may require.

No. 345.

Purchaser v. Vendor.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, being the owner in fee of the following described premises, viz.: [*describe premises*], on said day sold the same to the plaintiff, and entered into an agreement in writing, duly signed, in relation thereto with the defendant. The following is a copy of said agreement:

[*Copy agreement.*]

2. On the day of, 18..., the plaintiff duly tendered to the defendant said sum of \$....., and requested him to convey said premises to plaintiff according to the terms of said agreement, but the defendant refused and still refuses to execute and deliver such conveyance.

3. The plaintiff has duly performed all the conditions of said agreement on his part.

4. The plaintiff now brings said sum of \$..... into court and offers the same to said defendant upon his executing and delivering to plaintiff a sufficient conveyance of said premises according to the terms of said agreement.

The plaintiff therefore prays that said defendant be required to receive said sum of \$..... so tendered, and to execute and deliver to plaintiff a deed of conveyance of said premises, with

covenants of general warranty, and for such other relief as justice and equity may require.

If the object of the action is not to enforce a specific performance of the contract, but merely damages for the breach thereof, omit paragraph 4 as above, and add the following:

4. "The plaintiff has sustained damages in the premises in the sum of \$....."

[*Prayer for damages.*]

No. 346.

Purchaser v. Vendor to Enforce a Verbal Contract.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant, being the owner in fee of the following described premises, viz.: [*describe premises*], sold the same to the plaintiff for the sum of \$....., payable as follows. [*state amounts and times of payment as in contract*], and agreed to convey said premises to plaintiff by a deed of general warranty upon the payment of said several sums of money.

2. The defendant thereupon delivered the possession of said premises to the plaintiff under said contract, and he has continued in possession of the same with the assent of the defendant from that time until the present.

3. The plaintiff has paid to the defendant the following sums on said contract of sale, viz.:

May 1, 1876, \$.....

May 1, 1877, \$.....

May 1, 1878, \$.....

There is still due said defendant on said contract the sum of \$....., which sum the plaintiff, on the day of, 18..., tendered to the defendant, and requested him to convey said premises according to the terms of said agreement, but the defendant refused and still refuses to execute and deliver said conveyance to plaintiff.

4. The plaintiff, during his occupancy of said premises under said contract, has made lasting and valuable improvements thereon, as follows: [*state what improvements*], of the value of \$.....

5. The plaintiff has duly performed all the conditions of said

contract on his part, and now brings said sum of \$..... into court and offers the same to said defendant upon his executing and delivering to plaintiff a sufficient conveyance of said premises according to the terms of said agreement.

[*Add prayer as in preceding form.*]

No. 347.

*Purchaser v. Legal Representatives of Vendor on a Bond for a Deed or Written Agreement.*¹

1. The plaintiff complains of the defendant for that one C. D., late of county, etc., being the owner in fee of the following described real estate situate in county, to-wit: [*describe premises*], and being desirous to sell said premises, and the plaintiff desirous to purchase the same, the said C. D., on said day, entered into a written agreement [*or writing obligatory*] with plaintiff, duly signed, for the sale thereof to him. The following is a copy of said agreement [*or writing obligatory*]:

[*Copy instrument.*]

2. On the day of, 18..., the plaintiff paid to said C. D. the sum of \$....., being a part of the purchase money due by the terms of said agreement, which sum was received by said C. D. and endorsed on said agreement.

3. On the day of, 18..., said C. D. departed this life intestate, leaving E. D., his widow, and,, and, his children, and only heirs at law.

4. Afterwards, and on or about the day of, 18..., one G. H. was duly appointed administrator of said estate by the county court of county, and is now the lawful administrator of said estate.

5. On the day of, 18..., the plaintiff paid to said G. H., administrator of said estate, the sum of \$....., being the balance due to said estate according to the terms of said written agreement, and demanded of said administrator a sufficient deed of conveyance of said premises, which he refused to give, alleging his want of authority to make the same.

6.,,, children of said C. D. deceased, are minors under the age of fourteen years, and have no guardian.

¹ See § 331 of chapter 17 G. S., entitled "Decedents."

The plaintiff therefore prays that the court will appoint a guardian *ad litem* for said minor heirs, and will authorize and require said administrator to convey said premises to the plaintiff in the same manner as said C. D. "might and ought to have done if living," and for such other relief as justice and equity may require.

No. 348.

Lessee v. Lessor for Specific Performance of an Agreement for a Lease.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant being possessed of the following described premises, to-wit: [*describe premises*], and being desirous of leasing the same, agreed to lease the same with the appurtenances to the plaintiff, and the plaintiff and defendant thereupon executed an agreement in writing, of which the following is a copy:

[*Copy agreement.*]

2. Relying upon said agreement the plaintiff has expended the sum of \$..... in repairing and improving said premises, and has [*state what acts have been done by the plaintiff in reliance on the agreement*].

3. The plaintiff has duly performed all the conditions of said agreement on his part, and has always been ready and willing, and still is, to accept a lease of said premises, and on the day of, 18..., he tendered to the defendant the rent thereof, as provided in said agreement, for the year, and requested him to make a lease for said premises to the plaintiff, but the defendant refused and still refuses to execute and deliver the said lease.

The plaintiff therefore prays that said defendant may be required to execute and deliver to the plaintiff a lease of said premises according to the terms of said agreement, and for such other relief as equity may require.

No. 349.

Against a R. R. to enforce an Agreement to Construct a Farm Crossing and for Damages.

1. The plaintiff complains of the defendant for that on the day of, 18..., the defendant had located its railroad across the [*describe premises*], being the farm of the plaintiff, on

which he resides, and on said day the plaintiff and defendant entered into an agreement in writing for the right of way of said railroad across said premises, and for a farm crossing. The following is a copy of said agreement:

[*Copy agreement.*]

2. In pursuance of said agreement the plaintiff, on the day of, 18..., executed and delivered to said defendant a deed of said right of way, but containing no reference to the agreement for a farm crossing.

3. On or about the day of, 18..., the defendant completed the construction of its railroad across said land, and made an embankment across the same twenty feet high, but failed to construct a farm crossing either over or through said embankment.

4. On the day of, 18..., the plaintiff requested the defendant, through its proper officers, to construct such crossing, but it then refused and still refuses to do so.

5. The plaintiff is the owner of fifty head of cattle which he keeps on said farm, and it is necessary each day to drive said cattle to the pasture across said railroad, but in consequence of the failure of the defendant, he is compelled daily to drive his cattle one mile out of a direct route, whereby he has sustained damages in the sum of \$.....

The plaintiff therefore prays that said defendant may be required to construct said crossing according to the terms of said agreement, and for damages in the sum of \$.....¹

NO. 350.

By Creditor to Enforce an Agreement to Execute a Mortgage.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff, being the owner of the following described property: [*describe property*], on said day entered into an agreement with the defendant to sell and deliver the same to him for the sum of \$....., one-half of which was to be paid on the delivery of said property, and the remainder in months from the date thereof, the defendant to give a

¹ See form No. 294, Conn. Pr., 1879.

Unless the agreement is relied on the proper remedy in this state, after request and refusal, would be mandamus. See § 186, chap. 11, G. S.

mortgage on said property to secure the payment of said sum of \$.....

2. In pursuance of said contract the plaintiff on said day delivered said goods to the defendant, and received from him the sum of \$....., being one-half of the price thereof, but said defendant did not deliver to plaintiff a mortgage upon said goods to secure the amount remaining unpaid thereon, as provided in said agreement.

3. On the day of, 18..., the plaintiff requested the defendant to execute and deliver said mortgage to plaintiff, which he then refused to do, and still refuses.

The plaintiff therefore prays that said defendant may be required to execute and deliver to plaintiff a mortgage on said property according to the provisions of said contract, and for such other relief as equity may require.

No. 351.

To Remove a Trustee and for an Injunction and Receiver.

1. The plaintiffs, A. B. and C. D., are husband and wife, and complain of the defendant for that on or about the day of, 18..., one E. F., the father of C. D., conveyed to the defendant, by a deed of conveyance, the following described real estate, viz.: [*describe premises*], in trust for the use and benefit of the plaintiffs. The following is a copy of said deed:

[*Copy deed.*]

2. Said defendant thereupon accepted said trust, and since that time has received the rents and profits of said estate, amounting in the aggregate to about the sum of \$....., and has paid taxes and other charges thereon amounting to about the sum of \$....., and has during said period paid the plaintiffs from the rents and profits so received about the sum of \$....., and has applied and converted the residue thereof to his own use.

3. The plaintiffs during said period have repeatedly applied to said defendant for an account of said rents and profits, and on or about the day of, 18..., demanded of him an account thereof, but he hitherto has and still refuses to account for the same.

4. The plaintiffs further represent that said defendant

threatens and is about to use and convert other portions of said trust property and apply the same to his own use, and will do so unless restrained by the order of this court.

The plaintiffs therefore pray that an account may be taken of all said trust property, and the rents and profits thereof which have come into the hands of said defendant, and that he be required to account for the same and pay to plaintiffs the amount which is found due to them from the defendant, and that said defendant may be removed from being trustee, and another may be appointed trustee in his stead, and in the meantime a receiver may be appointed to collect the rents and profits of said estate, and for such other relief as equity may require.

No. 352.

To Compel Infant Trustee to Convey.

1. The plaintiff complains of the defendant for that the defendant E. F. is an infant under the age of fourteen years, and is in possession of the following described premises [*describe premises*].

2. The plaintiff further represents that said lands were conveyed by one M. N. to G. F., the father of said E. F., by absolute deed of conveyance, but in trust nevertheless; and at the time of the execution and delivery of said deed to said G. F. he executed and delivered to plaintiff an instrument in writing, duly signed and attested, declaring that he held said lands in trust for the plaintiff during the lifetime of one L. D., and upon his death said G. F. to convey the same to plaintiff.

3. On or about the day of, 18..., said G. F. died intestate, and the defendant is the sole heir of his estate.

4. The plaintiff further alleges that on the day of, 18..., said L. D. died, and the plaintiff is now entitled to a conveyance of said estates.

The plaintiff therefore prays that a guardian may be appointed for said infant, and that he be authorized and required to execute and deliver to plaintiff a deed conveying the legal title and all the right, title, and interest of said infant to said premises, and for such other relief as equity may require.

No. 353.

*By Trustees for Advice, Direction, and Settlement of Accounts.*¹

1. The plaintiffs complain of the defendants for that on the day of, 18..., one A. B., of, desiring to make a voluntary settlement in trust of the bulk of his property in contemplation of marriage, by his deed of said date, duly executed and acknowledged, sold, transferred, and conveyed to the plaintiffs, as joint tenants, to them and the survivor of them, the following described real and personal property, viz.: [*describe property*]. The following is a copy of said deed:

[*Copy deed.*]

2. For the accommodation of said A. B., and at his solicitation, the plaintiffs accepted said conveyance upon the aforesaid trusts, and said deed was duly delivered by said A. B. to the plaintiffs, and was duly recorded in the record of deeds of county on the day of, 18...

3. On the day of, 18..., said A. B. married C. D., who is now living, and there have been born lawful issue of said marriage, as follows:, aged ... years;, aged ... years; and, aged ... years.

4. The plaintiffs have held and managed the property conveyed by said deed ever since the delivery of the same, and have duly paid over to said A. B. the net income arising from said trust, as is provided in said deed.

5. The plaintiffs have sold part of the property conveyed to them in said deed, and have re-invested the proceeds thereof in other property for the benefit of said trust, pursuant to the powers given them in said deed.

6. There have come into their hands, and are now held by plaintiffs as a part of said trust property, six hundred and seventy-eight shares of the capital stock of the Hartford Steel Manufacturing Company, and forty-two shares of the capital stock of the Union Copper Company, which companies are duly incorporated under the laws of the state.

7. Said stocks have thus far proved, and at present continue to be, profitable investments, and the plaintiffs have held and

¹ See Story's Eq. Juris., § 961.

now hold the same as such trustees with the knowledge and assent of said A. B., and neither said A. B. nor the plaintiffs know of any other securities, which in their judgment would probably produce a greater net income with greater certainty and safety. But the plaintiffs are in doubt and are unwilling longer to hold so large an amount of said stocks without the advice and protection of a decree of a proper court.

8. [*Set forth a full statement of the proceedings, investments and disbursements of the trustees, from the commencement of the trust.*]

9. Ever since accepting said trust the plaintiffs have rendered frequent accounts of their management of said trust and of the receipts and expenditures on account thereof to said A. B., and he has approved the same; but inasmuch as said trust is necessarily of very long duration, and the rights of said minor children born, or that may be hereafter born, are involved in the administration of said trust, as well as the rights of his wife, the plaintiffs feel it to be their right and duty to ask the court to examine into their administration of said trust from the commencement thereof, their sales and purchases, investments and re-investments, as respects the principal of said trust fund, and their receipts, charges, and disbursements on account of the income thereof, and to pass upon the propriety and correctness of their said doings and accounts, and to make a complete settlement to the date of the decree of all matters between the plaintiffs and the parties interested.

10. The value of the trust property now in the hands of the plaintiffs is about \$....., and is situated in this state, and said A. B. has, since the acceptance of said trust by plaintiffs, removed out of this state, and now resides with his wife and children in the city of

The plaintiffs therefore pray—

1st. That the court will advise and order whether they may or shall hereafter hold as part of said trust property said stocks in said manufacturing companies or any part thereof.

2d. That the court will examine into the administration of said trust by the plaintiffs from the commencement thereof down to the time of such examination, including all their sales and purchases, investments and re-investments, as respects the

principal of said trust fund, and all their receipts, charges, and disbursements on account of the income thereof, and will pass upon the propriety and correctness of the said doings and accounts, and make a complete settlement up to the date of its decree of all said matters as between the plaintiffs and all parties interested in said trust.¹

No. 354.

*By Executor and Trustee for the Construction of a Will.*²

1. The plaintiff complains of the defendant for that on the day of, 18..., one, of, died seized of an estate of an estimated value of \$....., leaving a will duly executed and attested, which on the day of, 18..., was duly admitted to probate in the county court of county, and was duly recorded as required by law. The following is a copy of said will:

[*Copy will.*]

2. The plaintiff is the sole executor and trustee named in said will, and has duly qualified as such, and is the sole trustee thereunder.

3. The plaintiff, as executor of said will, has paid all lawful claims against said estate, and all legacies provided for in said will, and on the day of, 18..., duly rendered an account of all his proceedings in the settlement of said estate to said probate court, which account was settled and approved by the court.

4. After the payment of the lawful claims against said estate, and of the legacies given by said will, and the expenses of the settlement of said estate, there remained in the hands of the plaintiff no residuary estate whatsoever applicable to the purposes of the trust provided for in the sixteenth section of said will, except the two tracts or parcels of land, with the buildings thereon, in the sixteenth section of said will specifically described, which are of the value of not less than \$20,000.

5. No church edifice has been erected upon either of the

¹ The above is the substance of the petition No. 317 in the Connecticut Practice Act of 1879.

² See No. 331 Conn. Practice Act, 1879.

tracts of land in the sixteenth section of said will, set apart for that purpose, nor has any application ever been made to the plaintiff for the occupation or use of said premises for the erection of said church edifice, nor have any steps been taken by any person or persons, society or ecclesiastical organization, for the purpose of availing themselves of the provisions of the trust by said sixteenth section intended to be created.

6. By reason of the failure of the residuary estate as contemplated by said sixteenth section, the plaintiff is without funds or the means of raising them to keep the house in said sixteenth section properly insured or to make the repairs upon said house necessary to keep it in proper and tenantable condition, or to pay the taxes lawfully assessed against the premises, or the assessments properly laid thereon for local and municipal purposes, and the taxes already assessed against said premises have remained unpaid for a series of years and now amount to \$....., bearing interest at the rate of per cent.

7. and, named in the sixteenth section, have both deceased since the death of said testatrix, and their interests under the provisions of the will have ceased.

8. The following persons claim to have some interest in or title to the premises described in said sixteenth section of said will, to-wit: [*naming them*], as next of kin and heirs of said [*testator*] deceased.

9. Various questions have arisen and various claims have been made by the different persons hereinbefore named relative to the construction, validity, and legal effect of certain of the provisions, devises, and trusts contained in said will, among which are the following:

First. Whether any legal effect can be given to any part of the sixteenth section of said will, and if so, what? and whether all or any part of said section is or is not void; and whether any portion of the scheme contemplated by said section can be made legally operative.

Second. Whether the trust made, or which it was attempted to make, in said section is valid and operative and capable of being carried out in any legal manner, and if so, how? and whether the trust estate thereby created, or which it was at-

tempted to create, is now a valid and subsisting estate; and whether the provision for accumulation therein contained is a legal and valid provision, and if not, whether the other provisions of said section are thereby rendered inoperative and void.

Third. Whether the trust, which it was sought to create by said section, is or is not void for uncertainty, indefiniteness, and a failure of the object of the testatrix's bounty.

Fourth. In the event of said trust being adjudged to be inoperative or invalid, or to have failed, then to whom, and in what proportions, and in what manner, the tracts of land mentioned are to be conveyed; or whether such tracts, or either of them, revert, or in right and in law belong to the heirs at law of the testatrix, and who such heirs are.

Fifth. The plaintiff is ready and willing to convey said estate as the same shall appear of right to belong, but he is in doubt as to said several questions, and as to the true construction of the clauses and paragraphs of said will to which said questions relate; and by reason of the conflicting claims of the various parties in interest and of the uncertainty and ambiguity of the various clauses of said will he is exposed to sundry suits by said claimants, and to loss and damage therefrom.

The plaintiff therefore prays—

1st. For the advice and protection of the court in giving a construction to the several clauses and provisions of said will in respect to which have arisen said various claims and questions.

2d. An adjudication and decree settling the construction of said will, and directing the plaintiff in what manner he shall carry its trusts into execution, so that he may execute the same properly and with safety to himself, and for such other relief as equity may require.¹

No. 355.

Double Aspect. First, that no Title passed at a Judicial Sale; Second, if the Court Finds Title passed to render a Decree that the Purchaser hold as Trustee.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff was the sole owner of four shares of the capital stock of the company, said company

¹ See *Jocelyn v. Nott*, 44 Conn., 55.

being duly organized as a corporation under the laws of this state.

2. On or about the day of, 18..., there were levied certain assessments upon the capital stock of said corporation for the purpose of carrying on its business, and among the assessments was one of \$500 upon the said shares owned by plaintiff, upon which the plaintiff paid the sum of \$100, but failed to pay the remaining \$400 due thereon.

3. On the day of, 18..., said corporation filed a petition in the district court of Douglas county against the plaintiff praying that an account might be taken of the amount due from plaintiff upon said assessments, and the plaintiff be required to pay the same by a day to be fixed by the court, or in case of default that said shares be sold and the proceeds thereof applied to the payment of the same.

4. On the day of, 18..., a decree was rendered in said cause finding that there was due from the plaintiff upon said assessments the sum of \$500, and that the same was a specific lien upon the shares of capital stock owned by him, and ordering said shares to be sold one by one until the sum so found due be raised; the sale to be conducted in all respects as in cases of sales of real estate upon execution, and the plaintiff herein was enjoined from encumbering or intermeddling with said shares until the further order of the court.

5. At the time said petition was filed and said decree rendered the plaintiff was a non-resident of the state of Nebraska, and neither he nor said shares were within the jurisdiction of the court rendering the decree.

6. At the time said decree was rendered the plaintiff was a member of the firm of H. W. & Co., and said firm was indebted to one D., in the city of Omaha, in about the sum of \$800, which they had been unable to pay, and being on friendly and intimate terms with said D., and desirous of securing to him the amount of said debt as well as to obtain from him a sufficient amount to pay off said assessments, and being about to start on a journey to Colorado, the plaintiff consented to a proposal of said D. to bid in said shares at a sale under said decree and hold the same as security for the amount found due from said firm of H. W. & Co.,

and the amount which might be advanced by said D. on said bid to pay said assessments and the interest thereon until plaintiff should be able to repay said amounts, and upon repayment thereof said D. was to re-convey said shares to the plaintiff.

7. Afterwards, and on or about the day, 18..., one G., a master of said court, in execution of the decree thereof, offered said four shares of capital stock for sale, and there struck off and sold the same to the said D., who was then the president of said corporation, for the sum of \$120, but afterwards, and after said sale had closed, the name of the bidder was changed to C. D., said change being made without the knowledge or authority of said C. D., and without consideration, and for the sole purpose of placing said shares in the hands of an apparently innocent party, thereby defrauding the plaintiff of the benefit of said agreement.

8. The plaintiff further alleges that said D. paid no consideration whatever for said shares, and nothing whatever was paid upon said bid except a sufficient amount to pay the costs of the action.

9. Said shares were worth in the market at the time of said sale not less than \$3,000; that no appraisalment was made before said sale, nor was said sale advertised as required by law, nor was a report thereof made to the court and the sale confirmed, and no portion of the amount bid was ever applied to the payment of said assessments.

10. The plaintiff alleges that said court had no jurisdiction either of the person of the plaintiff or the subject matter of the action in which said decree was rendered, but by pretending that said C. D. acquired title to said shares by virtue of said proceedings the defendants have represented said shares in the meetings of the stockholders of said corporation, and have received and collected the dividends declared on said stock, amounting to about the sum of \$6,000, and after repaying the debt due from said firm of H. W. & Co. to said D., and the advances made by him under said sale, a large surplus of money remains in his hands which rightfully belongs to the plaintiff; yet said defendants absolutely refuse to account to plaintiff for the amount so collected by them and re-convey said shares, but

claim that the title to the same is in C. D., and that the plaintiff has no interest therein whatever, and are about to proceed to the collection of further dividends on said shares.

11. The plaintiff alleges that whatever right or interest was acquired or held by said defendants in said shares was so acquired and held in trust for the plaintiff.

The plaintiff therefore prays—

1st. That an account may be taken of the amount of moneys received by said defendants or either of them on account of dividends declared and paid on said four shares, together with interest thereon from the dates of said payments respectively, and also of the amount of the claims held by D. against the firm of H. W. & Co., and of any advances made by him on account of said shares, and the balance remaining to be paid to the plaintiff.

2d. That the defendants be ordered to transfer and convey to plaintiff all interest which they or either of them may have in said shares, and that they be enjoined from collecting or receiving any further moneys or dividends now or hereafter in the hands of said corporation payable on said four shares, and for such other relief as equity may require.¹

NO. 356.

By Heirs to Set Aside a Will.

1. The plaintiffs, A. B. and C. D., complain of the defendant for that on the day of, 18..., one E. F., the father of plaintiffs, but now deceased, executed an instrument in writing purporting to be his last will and testament, and afterwards, to-wit: on the day of, 18..., departed this life, leaving the following named persons besides the plaintiffs his heirs at law [*give names*].

2. The plaintiffs further represent that said C. D., by said instrument in writing purporting to be his last will and testament, professedly bequeaths all his estate as follows: [*state bequests as in will*].

3. The plaintiffs further represent that on the day of, 18..., said will was admitted to probate in the county

¹ The above is the substance of the petition in the case of *Williams v. Lowe*, 4 Neb., 382.

court of county, and letters testamentary thereon were granted to E. F. as sole executor of said will, who then and there took upon himself the duties of executor under said supposed will.

4. The plaintiffs allege that said E. F., at the time he executed said instrument purporting to be his last will and testament was not of sound mind and memory, but on the contrary was in his dotage, and his mind and memory were so impaired as to render him entirely incapable of making a will or making a proper distribution of his property.

5. The plaintiffs further represent that the defendants, G. H., I. J., and K. L., the only legatees in said pretended will, used the following undue means and false and fraudulent representations [*state in detail what improper means were used*] to induce said C. D. to execute said instrument in writing, and that said improper inducements and influences did induce said C. D. to execute the instrument in question, and the said E. F., at the time of executing the same, was in fact under improper restraint from the fraudulent practices of said defendants.

The plaintiffs therefore pray that said instrument in writing, and the probate thereof, may be set aside and declared null and void, and declared not the last will and testament of said C. D., deceased, and that said estate may be distributed among the heirs of said C. D. according to law, and for such other relief as equity may require.

No. 357.

Ne Exeat.

1. The plaintiff complains of the defendant for that at the, 18..., term of the district court of county, to-wit: on the day of, 18..., she obtained a decree of divorce from C. D., to whom she had been formerly married, and for the payment by him to her of \$..... as alimony, to be paid in ten days from that date.

2. Said decree is still in full force and effect and unreversed, but no part of said alimony has been paid, although more than ten days have elapsed since said decree was rendered.

3. The defendant has converted his property into money, and

declares he will never pay a cent of said alimony, and that he will leave the state and be out of reach of the courts of the state in a week.

4. The defendant has no visible property liable to attachment or execution of which the plaintiff has any knowledge, but has sufficient means for the payment of said alimony concealed in his possession or control.

The plaintiff therefore prays that a writ of *ne exeat* may forthwith issue to prevent the defendant from leaving this state until he has paid said alimony.¹

No. 358.

By One Firm Against Another where One Person is a Member of Both Firms.

1. The plaintiff complains of the defendants, N. O., P. Q., and R. S., for that on or about the day of, 18..., the plaintiff and N. O. entered into partnership under the name and style of A. & Co., for the purpose of carrying on the business of, in the city of, and the said N. O., P. Q., and R. S., also on or about the day of, 18..., formed a partnership under the name and style of O. & Co. for the purpose of carrying on the business of in the city of

2. There were large dealings between said firms amounting to about the sum of \$....., and the said firm of O. & Co. have become indebted to the plaintiffs in about the sum of \$....., upon an account, as follows: [*set forth the substance of the account.*]

3. The plaintiff further alleges that said account is still unsettled, and that said N. O. refuses to join in an action to settle the same, and is made defendant in this action.

The plaintiff therefore prays that an account may be taken of the dealings between said firms, and that the defendant's firm be required to pay plaintiff's firm whatever balance may be found due them, and for such other relief as equity may require.²

¹ The above is the substance of the petition No. 205 in the Connecticut Practice act of 1879. See *Lyon v. Lyon*, 21 Conn., 199, note. The writ is an efficient remedial process in cases of action for an account or for alimony. *Denton v. Denton*, 1 Johns. Ch., 441. *Prather v. Prather*, 4 Dessau, 33. *Hammond v. Hammond*, 1 Clark, 551. And see *Dean v. Smith*, 23 Wis., 483, where it was held that restraint under the writ was not imprisonment within the prohibition of the constitution.

² See *Cole v. Reynolds*, 18 N. Y., 74.

No. 359.

On a Lost Note.

1. The plaintiff complains of the defendant for that said defendant, on the day of, 18..., made and delivered to the plaintiff a promissory note in writing of that date, and thereby promised to pay the plaintiff or bearer the sum of \$..... in ninety days from that date.

2. The plaintiff alleges that after receiving said note from the defendant, and before the same became due, he lost the same.

3. Afterwards, on the day of, 18..., when said note became due and payable, the plaintiff notified the defendant of said loss, and then tendered to him a sufficient bond of indemnity, signed by plaintiff and, and, as sureties, conditioned to indemnify said defendant against all liability by reason of said note, and then requested said defendant to pay the amount thereof to plaintiff, which he then refused and still refuses to do.

4. The plaintiff now brings said bond of indemnity into court and tenders the same to the defendant.

The plaintiff therefore prays judgment against the defendant for the sum of \$....., with interest thereon from the day of, 18...

No. 360.

To Cancel Deed and Quiet Title.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., one C. D., being the owner in fee of the following described premises, to-wit: [*describe premises*], sold and on said day conveyed the same by deed duly executed to E. F., who, on the day of, 18..., by his deed duly executed, conveyed said premises to the plaintiff.

2. Immediately after the purchase of said premises by plaintiff he took possession of the same, and said premises have been in the actual use, occupation, and possession of the plaintiff ever since said purchase, and plaintiff has made valuable improvements thereon, of the aggregate value of \$.....

3. All the deeds of conveyance of said premises, except the deed from C. D. to E. F., were duly recorded in the records of county, soon after the same were executed and deliv-

ered, but by accident said deed from C. D. to E. F. was not recorded until about the day of, 18..., and while plaintiff was in possession of said premises.

4. On or about the day of, 18..., one G. H. obtained, with full knowledge of plaintiff's rights therein, a quit-claim deed for said premises from said C. D., for an alleged consideration of \$....., and has had the same recorded in the records of said county, and now sets up and claims title to said premises against the plaintiff, but refuses to commence an action at law to try his title to the same, and said deed is a cloud upon plaintiff's title to said premises, and tends to depreciate the value thereof.

The plaintiff therefore prays that said deed from C. D. to G. H. may be set aside and declared null and void, and that the cloud upon plaintiff's title caused thereby may be removed, and for such other relief as equity may require.¹

No. 361.

For Change of Name of Person.

In the matter of the change of name of A. B.

The plaintiff represents to the court that his name is A. B., that he has been a *bona fide* resident of county, Nebraska, for one year prior to filing his petition in this case, and that he is desirous of changing his name for the following reasons:

First. [State cause.]

Second.

And desires to have his name changed from A. B. to C. D.

The plaintiff therefore prays, etc.

No. 362.

To Change Name of Town, Village, or City.

In the matter of the change of name of the town of

The plaintiffs herein represent to the court that they are *bona fide* residents of and legal voters in the town of, in county, and constitute a majority of all the legal voters therein, and are desirous of changing the name of said town for the following reasons:

¹ G. S., 483.

First. [State cause.]

Second.

And desire to have the name of said town changed from to, there being no other town, city, or village in the state of the name prayed for.

The plaintiffs therefore pray, etc.

No. 363.

Divorce for Adultery, for Custody of Children, and for Alimony.

1. The plaintiff complains of the defendant for that on the day of, 18..., at, in this state, she was married to the defendant, and has since resided therein, and has ever since said marriage conducted herself toward the defendant as a faithful, chaste, and obedient wife.

2. The plaintiff further represents that said defendant, regardless of his marital duties and obligations, on the day of, 18..., at No. street, in the city of, committed adultery with one [or if the name is unknown the allegation may be, "with a woman whose name is unknown to the plaintiff"], without the consent or connivance of the plaintiff, and the plaintiff has not cohabited with the defendant since the discovery of such offense.

3. The following children are the issue of said marriage, to-wit: [give names and ages].

4. The plaintiff further represents that said defendant is a man of vicious and vulgar habits, and is wholly unfit to be entrusted with the care, custody, and education of children.

5. The defendant is the owner in fee of the following described real estate, to-wit: [describe it], of the value of \$....., and is also possessed of personal property consisting of [describe property], of the value of about \$....., and the plaintiff is entirely without means to support herself and said children, or to prosecute this action, and said defendant wholly neglects and refuses to supply the necessities of the plaintiff and said children.

The plaintiff therefore prays that she may be divorced from said defendant, and that she may be given the custody of said children, and that said defendant be decreed to pay her reasonable alimony, and for such other relief as equity may require.

No. 364.

For Willful Abandonment where the Marriage was not Solemnized in this State.

1. The plaintiff complains of the defendant and alleges that for six months immediately preceding the time of filing this petition she has been a resident of county in this state.

2. That on the day of, 18..., at, in the state of, she was married to the defendant, and has ever since conducted herself toward said defendant as a faithful, chaste, and obedient wife.

3. The defendant, disregarding his duties as a husband, on the day of, 18..., willfully deserted the plaintiff, and for more than two years last past has been willfully absent from her without a reasonable or just cause.

The plaintiff therefore prays that she may be divorced from said defendant, and that she may have such other relief as equity may require.

No. 365.

For Physical Incapacity.

1 and 2. [*As in preceding form.*]

3. At the time of said marriage the defendant was, and ever since has remained, physically incapable of consummating said marriage by sexual intercourse of the parties by reason of the following incurable personal defects, to-wit: [*state the nature of the incapacity*], which incapacity was well known to the defendant at the time of said marriage, but was unknown to plaintiff.

[*Continue as in preceding form.*]

No. 366.

Habitual Drunkenness.

1 and 2. [*As in No. 364.*]

3. The plaintiff further represents that said defendant, wholly regardless of his obligations as a husband, soon after said marriage commenced the excessive use of intoxicating liquors, and has for two years last past been an habitual drunkard.

[*Continue as in No. 364.*]

No. 367.

Extreme Cruelty.

1 and 2. [*As in No. 364.*]

3. The plaintiff further represents that on or about the day of, 18..., the defendant, regardless of his duties as a husband, was guilty of extreme cruelty toward the plaintiff without any cause or provocation on her part [*state each act of violence according to the facts*].

No. 368.

Imprisonment.

1 and 2. [*As in No. 364.*]

3. At the, 18..., term of the district court of county, and before this action was commenced, the defendant was duly convicted of the crime of, and was thereupon sentenced by said court to confinement in the penitentiary of the state for [*three*] years, which sentence and judgment still remain in full force and not reversed, and said defendant, in pursuance of said sentence, is now confined in said penitentiary.

No. 369.

Prior Marriage.¹

1 and 2. [*As in No. 364.*]

3. The plaintiff avers that at the time the defendant was married to plaintiff he had a former wife living, to whom he had been prior to that time lawfully joined in marriage.

No. 370.

Prior Marriage, and that the Issue of the Second Marriage be Adjudged Legitimate.¹

1 and 2. [*As in No. 364.*]

3. The plaintiff avers that said defendant and one E. F. were married at, in the state of, on the day of, 18..., and that they cohabited together as husband and wife until about the day of, 18..., since which time the said E. F. remained absent from said defendant, and

¹ A second marriage in a case of this kind is void, and the only object of obtaining a decree is to conclusively settle its invalidity.

she had at no time prior to said marriage with plaintiff either seen or heard from him during said period, but was informed that he was dead, and so believed, and said marriage with plaintiff was entered into with the full belief on the part of the plaintiff and defendant that said E. F. was dead.

4. Said E. F., the former husband of the defendant, is now living at, and claims the defendant as his wife.

5. The issue of said marriage of the plaintiff with the defendant now living is as follows: [*give names and ages of children*].

The plaintiff therefore prays that said marriage between the plaintiff and defendant may be declared null and void, and that defendant is not entitled to dower in plaintiff's real estate, or of any share or interest in his personal estate, and that said marriage be decreed to have been contracted in good faith with the full belief of the parties that E. F. was dead, and that the children of said marriage, as aforesaid, be adjudged legitimate issue of the plaintiff, and for such other relief as equity may require.

NO. 371.

*On the Ground of Nonage.*¹

1. The plaintiff is the father [*mother or guardian*] of A. B., and complains of the defendant for that on the day of, 18..., said A. B. intermarried with the defendant at, in this state, and said A. B. has continued to reside at therein from that time until the present.

2. At the time of said marriage said A. B. was but fifteen years of age, and incapable of contracting marriage.

3. Said A. B. and defendant cohabited together until about the day of, 18..., since which time they have not cohabited as man and wife; said A. B., at the time said cohabitation ceased, being less than sixteen years of age.

The plaintiff therefore prays that said marriage between said A. B. and the defendant may be dissolved and declared null and void, as provided in the statute, and for such other relief as equity may require.

¹ See Gen. Stat., 349.

No. 372.

Lunacy of Plaintiff.

1 and 2. [*As in 364.*]

3. The plaintiff at the time said marriage took place was, and for several years prior thereto had been, a lunatic, and of unsound mind, and entirely incapable of entering into the marriage relation, of all which the defendant had due notice at the time of said marriage.

4. The plaintiff is now entirely recovered from his aforesaid lunacy, and entirely restored to his reason, memory, and understanding, and has been so restored for about one year last past, and since his restoration to reason he has not cohabited with said defendant.

The plaintiff therefore prays that said marriage may be dissolved and declared null and void, as provided in the statute, and for such other relief as equity may require.

PARTITION.

No. 373.

Petition Filed by an Heir.

1. The plaintiffs complain of the defendants for that on the day of, 18..., one C. D. died intestate, seized in fee of the following described real estate: [*describe land*], situate in county.

2. Said C. D., deceased, left as his children and only heirs at law the following persons, viz.: [*give names, ages, and place of residence, if known, of all the heirs*].

3. The plaintiff, as an heir of said C. D., has an undivided [*sixth*] interest in said land, and each of the defendants have a similar estate of an undivided [*sixth*] interest therein.

The plaintiff therefore prays for judgment confirming the shares of the parties as above set forth, and for a partition of said real estate, according to the respective rights of the parties interested therein, or, if the same cannot be equitably divided, that said premises may be sold and the proceeds thereof be divided between the parties according to the respective rights, and for such other relief as equity may require.

No. 374.

By Purchaser at Execution Sale of the Title of One of the Heirs.

1 and 2. [*As in preceding form.*]

3. The plaintiff further alleges that at the, 18..., term of the district court of county he recovered a judgment against E. F., one of said heirs of said estate, for the sum of \$....., upon which an execution was duly issued and levied upon the right, title, and interest of said E. F. in said premises, and thereafter, on the day of, 18..., at a public sale thereof under said execution, the plaintiff became the purchaser of the right, title, and interest of said E. F. therein for the sum of \$....., which sale was thereafter, on the day of, 18..., duly confirmed by said court, and a deed for the interest of said E. F. in said land made to the plaintiff.

[*Continue as in preceding form, changing the 3d paragraph to conform to the facts.*]

No. 375.

When an Heir has Conveyed his Undivided Interest in the Land.

1 and 2. [*As in No. 373.*]

3. The plaintiff further represents that on or about the day of, 18..., and subsequent to the death of said C. D., the said E. F. and wife, by their deed of that date duly executed and acknowledged, conveyed to plaintiff all their right, title, and interest in the above described premises.

[*Continue as in 373.*]

No. 376.

For Partition and to require Co-Tenant to Account for Rents and Profits.

1 and 2. [*As in 373.*]

3. The plaintiff further alleges that since he and the defendants have owned said premises in common, to-wit: since the day of, 18..., E. F., one of said defendants, has received all the rents and profits thereof, and on the day of, 18..., the plaintiff requested said defendant to account to him for the same, which he refused to do. The plaintiff is unable to state the exact amount of such rents and profits, but to the best of his knowledge and belief they exceed \$.....

[*Continue as in No. 373.*]

Add prayer for a referee to take and state an account. See *Mills v. Miller*, 3 Neb., 87.

No. 377.

Creditor having a General or Specific Lien.

1, 2, and 3. [*As in No. 373.*]

4. The defendant G. H. has [*a mortgage*] heretofore executed by the defendant E. F. upon his interest in said premises for the payment of \$....., due and payable on the day of, 18..., with interest from the day of, 18...

No. 378.

Lands Subject to Dower.

1 and 2. [*As in No. 373.*]

3. The defendant E. D. is the widow of C. D., the father of plaintiff, and [*co-tenants*] and as such widow has a right of dower in said premises, which has not been admeasured.

[*Continue as in 373.*]

No. 379.

In Case of Unknown Owners.¹

1. The plaintiff complains of the defendant for that plaintiff and defendant now are, and have been since the day of, 18..., seized in fee and tenants in common each of the undivided half of [*describe premises*].

2. The plaintiff further represents that said defendant, on or about the day of, 18..., left this state with the intention of residing in Washington territory, but his present place of residence is wholly unknown to the plaintiff, although he has made diligent inquiry by correspondence with persons in the principal towns of that territory in regard to his place of residence.

[*Continue as in No. 373.*]

No. 380.

For Dower.

1. The plaintiff complains of the defendant for that on or about the day of, 18..., the plaintiff intermarried with

¹ It is advisable to set forth the title of the unknown owners if it can be done with certainty. In this state probably it is not necessary to set forth what efforts have been made to discover the co-tenant, partition being a matter of right, and it being unnecessary to serve a copy of the petition.

C. D., late of county, who afterwards, on or about the day of, 18..., departed this life intestate, leaving the plaintiff, his widow, and E. F., G. H., I. J., and K. L., his children and only heirs at law.

2. Said C. D., during the time of said marriage, was seized in fee of the following described real estate, to-wit: [*describe premises*], situate in county, which premises the defendant L. M. now claims to possess.

3. The plaintiff, by reason of said marriage, upon the death of said C. D. became entitled to dower in the lands above described, which dower has never been assigned to her, nor has she received any equivalent therefor, or released the same.

The plaintiff therefore prays that she may recover dower in the premises above described, and for such other relief as equity may require.

No. 381.

By Heir to have Dower Assigned.

1. The plaintiff respectfully represents to the court that on or about the day of, 18..., C. D. and E. D., the father and mother of plaintiff, were married at, and that afterwards, on the day of, 18..., said C. D. died intestate, leaving said E. D., his widow, and G. H. and I. J., his children and only heirs at law.

2. Said C. D. died seized in fee of the following described real estate: [*describe it*], situate in county.

3. Said E. D., by virtue of said marriage, upon the death of said C. D. became entitled to dower in the above described lands, which dower has never been assigned to her, nor has she received an equivalent therefor or released the same.

4. The plaintiff has purchased the right, title, and interest of I. J., his co-tenant in said premises, and is compelled to encumber the same and to have said dower assigned, and said E. D. refuses to apply for the assignment thereof.

Add prayer.

No. 382.

Estate by the Curtesy.

1. The plaintiff complains of the defendant for that on the day of, 18..., the plaintiff intermarried with one E.

D., who afterwards, on the the day of, 18..., and while such marriage relation was subsisting, departed this life intestate, leaving G. H., I. J., and K. L., her children, the issue of said marriage with the plaintiff.

2. Said E. D. died seized in fee of the following described real estate, viz.: [*describe premises*], situate in county, and left no issue by a former husband to whom said estate might descend.

3. The plaintiff, by virtue of such marriage, upon the death of said E. D. became entitled to dower in the lands above described, which dower has never been assigned to the plaintiff, and he has never received any compensation therefor or relinquished the same.

The plaintiff therefore prays that he may recover and hold said premises as tenant by the curtesy, and for such other relief as equity may require.

CHAPTER XVIII.

MANDAMUS, REAL ACTIONS, QUO WARRANTO, ETC.

No. 383.

To Compel the Sheriff to call Appraisers to Appraise Exempt Property.

1. The plaintiff complains of the defendant for that said plaintiff is the head of a family, a resident of this state, and actually engaged in the business of agriculture; that he has neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state.

2. On the day of, 18..., one F. commenced an action by attachment against him in the court of county, and caused the order of attachment issued therein to be delivered to and levied by the defendant, who was the sheriff of said county, on a span of horses, one wagon, a set of harness, and about twenty-four hundred bushels of corn, all belonging to plaintiff.

3. The plaintiff thereupon filed with the defendant an inventory, under oath, of the whole of the personal property owned by him and claimed said property as exempt, but said defendant refused and still refuses to call to his assistance three disinterested freeholders of said county and have the said property appraised, and is about to proceed to sell the same under said order of attachment.

4. Said action was not brought upon a claim for clerks', laborers', or mechanics' wages, nor for money due and owing by an attorney at law for money or other valuable consideration received by said attorney from any person or persons.

The plaintiff therefore prays that a peremptory writ of mandamus may issue, commanding said defendant forthwith to call to his assistance three disinterested freeholders of said county and appraise said property, and for costs of this action.¹

No. 384.

To Compel a Public Officer to Discharge the Duties of his Office in the Jurisdiction for which he was Elected.

1. The plaintiff complains of the defendant, and for cause of action alleges that the city of Omaha is a municipal corporation organized as a city of the first class under the general laws of the state, and is divided into six wards, or precincts, and has been so organized and divided for years last past.

2. The plaintiff is a resident of the sixth ward of said city, and is an attorney at law and engaged in the practice of his profession.

3. At the annual election held in said city, on the day of, 18..., the defendant was duly elected justice of the peace in and for the sixth ward or precinct of said city for the term of two years and until his successor is elected and qualified, and thereupon entered upon the duties of said office.

4. It is the duty of said defendant, under the laws of this state, to hold his said office and to exercise the duties thereof in the sixth ward of said city and at no other place; but disregarding his duties in that respect, he, on or about the day of

¹The above is the substance of the petition in the case of *The State, ex rel. Metz, v. Cunningham*, 6 Neb., 90.

The petition must be verified positively. *State, ex rel. Roberts, v. Lincoln*, 4 Neb., 260.

....., 18..., moved his said office to the fourth ward of said city, and has ever since and now holds said office and exercises the duties thereof in said fourth ward.

5. The plaintiff further represents that said sixth ward is entitled to two justices of the peace within its boundaries, to hold and exercise the duties of their offices therein, but the other justice of the peace elected in said sixth ward now holds his office in the fourth ward of said city, by reason whereof the inhabitants of said sixth ward are entirely deprived of the presence and benefit of the magistrates to which they are entitled under the law.

The plaintiff therefore prays that said defendant may be compelled to hold his said office and exercise the duties thereof in the sixth ward of said city, and for costs of suit.¹

No. 385.

To Compel a Railroad Company to Operate its Entire Line of Road.

The attorney general shows to the court that—

1. The railroad company was incorporated by the general assembly of this state in 18..., with power to construct and operate, and for the purpose of constructing and operating a railroad for the transportation of passengers and freight from to the navigable waters of harbor, at some point between the and

2. The road was soon after constructed and put in operation between and the waters of harbor, at a point within the prescribed limits.

3. The road connected at its terminus at harbor with a line of steamboats which was established and run under a charter granted by the general assembly of the state of, for the transportation of persons and freight from said railroad to the city of, and from the latter to said railroad.

4. Said railroad and line of steamboats have for a long time constituted a direct and important route for the public travel, greatly accommodating the same, and necessary to the public convenience.

¹ The above is the substance of the petition in the case of *The State, ex. rel. Ferguson, v. Shropshire*, 4 Neb., 411.

5. The respondent is bound by the terms of its charter to run its cars and transport passengers to its terminus to such an extent as to afford reasonable accommodation to the traveling public.

6. The respondent, on the day of, 18..., wholly discontinued the running of its passenger trains to said terminus, although often requested to continue them by persons desirous of being transported over that part of its road, and ever since has refused, and now refuses, to run its passenger cars over that part of its road.

The attorney general therefore moves the court for a writ of mandamus requiring said corporation to run its cars over that part of its road in such manner as shall reasonably accommodate the public travel and conform to the requirements of its charter.¹

REAL ACTIONS.

No. 386.

To Recover Possession of Real Estate, and for Rents and Profits.

1. The plaintiff complains of the defendant for that said plaintiff has a legal estate in and is entitled to the possession of the following described premises, to-wit: [*describe premises*], situate in county, and said defendant, ever since the day of, 18..., has unlawfully kept and still keeps the plaintiff out of the possession thereof.

[*Second cause of action.*]

2. The defendant, while unlawfully in possession of said premises, has received the rents and profits thereof from the day of, 18..., to the commencement of this action, amounting to the sum of \$....., and has applied the same to his own use, to the plaintiff's damage in the sum of \$.....

The plaintiff therefore prays judgment for the delivery of the possession of said premises to him, and also for said sum of \$..... for said rents and profits.

No. 387.

Tenant in Common v. Co-tenant.

1. The plaintiff complains of the defendant for that said plaintiff has a legal estate in, and is entitled to, the possession,

¹ The above is the substance of petition No. 191 in the Connecticut Practice act of 1879.

as a tenant in common with the defendant, of the following described premises, to-wit: [*describe premises*], situate in county.

2. The defendant denies that the plaintiff has any estate in said premises as tenant in common or otherwise, and claims to own the entire estate.¹

[*Continue as in preceding form.*]

No. 388.

Information in the Nature of a Quo Warranto.

E. K. F., district attorney of the judicial district, who prosecutes in his own proper person, and at the relation of A. L. W., of....., gives the court to understand and be informed:

1. On the day of, 18..., said W. was a citizen of the United States, and an elector and resident of the fourth ward in the city of, and then had and now has all the qualifications required by law to hold the office of councilman in said city.

2. At the annual city election in said city, at the date aforesaid, for the election of one councilman from each ward, and for other officers in said city, in accordance with the provisions of law, said W. received for the office of councilman of said fourth ward 310 votes, and E. F. received for said office 200 votes, and said W. was thereby elected a councilman of said ward from the day of, 18..., and accepted the same, and claims to exercise the duties of said office.

3. Notwithstanding the election of the relator to said office, said E. F., of said city, on the day of, 18..., and from thence continuously hitherto, without any legal warrant, claim, or right, has used and exercised, and still does unlawfully use and exercise, the office of councilman from the fourth ward in said common council of said city for the term aforesaid in place of said W., and claims to be a councilman in place of said W., and to have, use, and enjoy all the rights, privileges, and franchises of said office, to the damage and prejudice to the right of said city of and said relator, and also against the peace of the state.

¹ § 628 of the code.

Said attorney therefore prays judgment that the defendant is not entitled to said office, and that he be ousted therefrom, and that said W. is entitled to said office, and to assume the execution of the duties thereof on taking the oath [*and filing the bond*] required by law.

No. 389.

By Plaintiff on his Own Relation.

A. B., in his own behalf, prosecutes this action, C. D., the district attorney of the district, having refused to prosecute the same, and gives the court to understand and be informed.

[*Continue as in preceding form.*]

CHAPTER XIX.

DEMURRER TO THE PETITION.

In the District Court of.....County, Nebraska.

William Wentworth, plaintiff, }
 v. }
 Henry Mathewson, defendant. }

The defendant demurs to the petition of the plaintiff for the following cause [*or causes*], which appear on the face of the petition:

First. The court has no jurisdiction of the person of the defendant [*or the subject of the action*].

Second. The plaintiff has not legal capacity to sue.

Third. There is another action pending between the same parties for the same cause.

Fourth. There is a defect of parties plaintiff [*or defendant*].

Fifth. Several causes of action are improperly joined.

Sixth. The petition does not state facts sufficient to constitute a cause of action.

SAMUEL JONES,

Attorney for Defendant.

A demurrer can be interposed only when it appears on the face of the pleading demurred to, that [*at least*] one of the six

causes designated in the code exists. *Mayberry v. Kelly*, 1 Kan., 116.

Construction of pleadings. Section 1 of the code provides that "the rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. Its provisions and all proceedings under it shall be liberally construed, with a view to promote its object and assist the parties in obtaining justice."

Section 121 provides that "in the construction of any pleading for the purpose of determining its effects its allegations shall be liberally construed, with a view to substantial justice between the parties."

Section 92 provides that the petition must contain * * * "a statement of the facts constituting the cause of action in ordinary and concise language, and without repetition." * *

Ordinary language is to be used in the statement of a cause of action or defense, and the language used is to be construed according to its ordinary meaning. This reverses the common law rule and abolishes all technical interpretation of ordinary language in pleading.

These rules of construction are not intended to exclude the use of technical terms peculiar to the various trades and professions. When necessary these are proper to be used in pleading.

Allegation of time in pleading. At common law it was unnecessary to prove the exact time alleged in a pleading, unless it was a material part of the contract. It was not, except when it was necessary to prove it as stated, necessary to state it correctly, as it was not of the substance of the issue.¹ The code has not changed the common law rule in this regard, and where it is not material to the issue it is not necessary to prove it, as stated in the pleading. Bliss on Code Pl., § 283.

But when time is a material fact to be proved to entitle the party to recover it must be correctly stated, and if denied must be proved as alleged. Id.

When the time is so alleged that it appears from the face of the petition that the action is barred by the statute of limita-

¹ 1 Steph. Pl., 292.

tions the defendant may demur, upon the ground that the petition shows on its face that the action is barred. *McKinney v. McKinney*, 8 O. S., 423. *Hurley v. Cox*, 9 Neb., 230. *Hurley v. Estes*, 6 Id., 386.

If a petition does not show *when* the cause of action accrued the statute of limitations cannot be interposed by general demurrer. *Mills v. Rice*, 3 Neb., 87. *Backus v. Clark*, 1 Kan., 303.

Allegations of place. As heretofore stated section 32 of the code provides that "the petition must contain, *first*, the name of the court and *county* in which the action is brought." No other allegation of place is required to be made in the petition. In actions in regard to real property, triable only in the county where it is situate, the petition should show that it lies in the county where the action is pending; but the failure to allege this fact in the petition will not render it demurrable, as it will be presumed that the action was brought in the proper county.

The law of the place where a contract was made becomes material when the contract is invalid by the laws of the forum, but valid where made, and *vice versa*. In such case the *place*, as well as the *foreign law*, become material, and both must be pleaded. Bliss on Code Pl., § 287. *Kittle v. DeLamatyr*, 3 Neb., 325.

Allegations of quality, quantity, and value. At common law, in an action to recover for an injury to goods and chattels, or on a contract in relation to them, it was necessary that their quantity, quality, and value, or price agreed upon, should be stated, and the code does not seem to have changed the rule. But the omission ordinarily must be taken advantage of by motion and not by demurrer.

Allegations of the title of interest of the party in the cause of action, counterclaim, or set-off. In actions by executors and administrators the pleading should show that they sue in their representative capacity. No particular form of words is necessary, and if the facts appear substantially in the pleading it is not demurrable; but the better course is to allege the death of the decedent, and that letters testamentary or of administration were duly issued to the plaintiff by a proper court, and that the plaintiff is then acting as executor or administrator. But proffer of the letters is unnecessary.

In actions by assignees in bankruptcy, or receivers appointed by a court, the proceeding of the court making the appointment should be set out in the petition, but if it appears from the petition that the action is brought by the party as assignee or receiver the pleading is not demurrable because the allegation is not as specific as it should be.

Allegations of ownership. When the plaintiff has become the owner of the subject of the action by assignment the petition should allege the fact of assignment to the plaintiff, but if instead thereof the allegation is that the plaintiff is the *owner*, the petition is not therefore demurrable, the remedy of the defendant being by motion to make definite and certain.

What facts must be alleged in a pleading. As a general rule a petition is good if it states all the facts, which, if controverted, the plaintiff would be bound to prove on the trial in order to maintain the action. Swan's Pl. and Prec., 148.

Neither presumptions of law nor matters of which judicial notice is taken need be stated in a pleading. Code, section 136.

What statement of facts is sufficient. Judge Swan, in his valuable work on Pleading and Precedents, page 155, says: "The statement of a fact in ordinary language embraces facts sometimes necessarily and clearly, sometimes indefinitely, implied. The English language, even when used in a more definite, certain, and precise manner than ordinarily, is imperfect in this respect and leaves something to be implied. The Code, however, in requiring statements in ordinary language, demands of courts to construe them and to hold them to embrace, impliedly in pleadings, all that the language embraces when used elsewhere. This is a fundamental and governing rule. The question, therefore, whether an allegation is a statement of a conclusion of law or fact has nothing to do with the sufficiency of Code pleadings, inasmuch as facts must be held to be implied from, and therefore embraced in the allegations of code pleadings precisely to the same extent as like language implies and embraces facts when ordinarily used by intelligent men in the statement of facts. If, when thus construed, the precise nature of the charge or defense is not apparent, the opposite party may be relieved from uncer-

tainty by motion compelling an amendment." See *Dorsey v. Hall*, 7 Neb., 460.

Judge Miller, of Iowa, in his excellent work on "Pleading and Practice," page 125, says: "Under the code, if the party pleading uses language which is equivocal, indefinite, or uncertain, the adverse party may compel him to make it unequivocal, definite, and certain; and if he neglects to do this, and the language is capable of two meanings, one of which supports the pleading, he has no right to complain when the court gives it that construction which makes the pleading sufficient." Also on page 142: "By ordinary language is to be understood, the use of such English words as are ordinarily and commonly used among intelligent persons in the statement of facts, as contra-distinguished from technical and artificial terms and phrases, as used in pleadings at common law."

The rule may be stated thus—if a statement of the *legal effect* of facts is destitute of any statement of fact it is insufficient, but if it contains the elements of a fact, construing the language by its ordinary meaning, it is subject to a motion to make definite and certain, but is not demurrable. The correct mode of pleading under the code, however, is to *state the facts* and not inferences or propositions of law derived from those facts.

A fact may be defined as a thing done, an act, circumstance, or event. A statement of facts, therefore, is a statement of things done, acts, or events. At common law it was necessary to plead not only the facts but the legal effect of the facts stated showing that the defendant was thereby liable. This is unnecessary under the code, as it requires the court to apply the law to the facts.

For form of order overruling demurrer with leave to answer see ante page 99.

When a demurrer is sustained on the ground of a misjoinder of several causes of action, the court, on motion of the plaintiff, shall allow him, with or without payment of costs, in its discretion, to file several petitions, each including such of said causes of action as might have been joined; and an action may be docketed for each of said petitions, and the same shall be proceeded in without further service. Code, section 97.

Sustained for Misjoinder of Causes of Action.

This cause having been submitted on the demurrer to the petition, on consideration whereof the court does sustain the same as to the misjoinder of causes of action, the plaintiff therefore has leave [*upon payment of all costs to date*], to file within days an amended petition in this action, and also to file other petitions for each cause of action so improperly joined, each cause to be docketed and proceeded in without further service.

For form of order where demurrer is sustained with leave to plaintiff to file an amended petition see *ante* page 100.

Sustained and Action Dismissed.

This cause having been submitted to the court on the demurrer to the petition, on consideration whereof the court does sustain the same.

And the plaintiff not desiring to amend his petition, it is considered by the court that said action be dismissed, and that the defendant go hence without day, and recover from the plaintiff his costs herein extended, taxed at \$.....

A demurrer to a petition raises an issue of law. It in effect controverts the legal sufficiency of the facts stated therein as not stating a cause of action against the party demurring.

At common law a demurrer would lie for defect of *form* as well as a failure to state facts sufficient to constitute a cause of action. A demurrer for formal defects was called a special demurrer and was required to point out the defect complained of. Special demurrers are abolished unless the second, third, fourth, and fifth grounds provided in the code may be regarded as such.

If the petition contain more than one cause of action the defendant may demur to one or all, but if his demurrer is to the whole petition and there is one good count it must be overruled. The demurrer should be restricted to the defective count or counts.

CHAPTER XX.

ANSWERS.

The title of the cause being made a part of the petition it is unnecessary to state the names of the plaintiff and defendant in the body of the pleading. See *ante* page 104.

At common law the title of the cause was changed in the defendant's pleadings, thus—C. D. ads. A. B.,¹ but the code has changed this rule and provides that the title shall not be changed.

No. 390.

General Denial.

In the District Court of County.

William Hutchinson, plaintiff, }

v.

Henry Mathewson, defendant. }

The defendant, in answer to the petition of the plaintiff, denies each and every allegation therein contained.²

No. 391.

General Denial of One or More Causes of Action where Several Causes are Joined in the Petition.

The defendant, in answer to the [first] [designate the number of the cause], denies each and every allegation therein contained.

No. 392.

*General Denial where the Defendant is Ignorant of the Facts and therefore Denies.*³

The defendant, in answer to the petition of the plaintiff, alleges that he has no knowledge or information whereon to form a belief as to the matters stated in said petition, and therefore denies each and every allegation therein contained.

¹ 3 Chitty Pl., 891.

² For form of affidavit to answer see *ante* page 87. The form given is in substance the language of the code. See section 116.

³ This form is authorized by *Treadwell v. Commissioners*, 11 O. S., 183. *Ante* page 72.

No. 393.

Specific Denial.

The defendant, in answer to the petition of the plaintiff, denies [*set out the material facts denied*], thus: the defendant denies that he had due notice of the non-acceptance of the bill of exchange set forth in plaintiff's petition; or, the defendant, in answer to the petition of the plaintiff, denies that he ever indorsed said promissory note, etc.¹

No. 394.

Specific Denial.

The defendant, in answer to the petition of plaintiff, denies each and every allegation contained in paragraphs numbered one, two, three, four, and six of said petition.²

No. 395.

Admission of Part and Specific Denial of the Residue.

The defendant, in answer to the petition of the plaintiff, [*does not deny*] [*or admits*] the allegations contained in the *first, third, fourth, and sixth* paragraphs of said petition, but as to all the other paragraphs in said petition he denies each and every allegation therein contained.³

A denial should be direct and unambiguous, and answer the *substance* of each direct charge.

No. 396.

Action Brought in Wrong County.

The defendant, in answer to the petition of the plaintiff, alleges that at the commencement of this action he was not a resident of nor within the county of, nor was service of summons had upon him therein.

[*Second defense.*]⁴

¹ Whatever in the petition is not denied by the answer is admitted. Care must therefore be exercised where a party rests his defense upon a special denial to see that it is broad enough to constitute a partial or entire defense. A denial of a mere proposition of law, containing no element of *fact*, raises no issue; but if the proposition of law contain an element of fact the rule is different.

² It is not a denial to answer that "the defendant does not admit." *Ante* page 72.

³ It is unnecessary to admit certain facts. The above form is admissible only in cases where the answer would appear to be inconsistent or equivocal, unless there was an admission.

⁴ There is but little doubt that an answer in abatement and to the merits may be filed at the same time, although if the matter in abatement is of a character to oust the court of jurisdiction, it would seem to be unnecessary to answer to the merits.

No. 397.

Action Brought in Wrong County.

The defendant, for answer to the petition of the plaintiff, alleges that the lands and tenements described in said petition, and for the recovery of which the action is brought, are wholly situate in county.

No. 398.

Where a Court of the United States Possesses Exclusive Jurisdiction.

The defendant, in answer to the petition of the plaintiff, alleges that this action is brought to recover for a penalty [*or forfeiture*] alleged to have been incurred under the laws of the United States, and to which the United States are parties, and arising within the district of, and the defendant, at the commencement of this action, was and still is a resident of said district.

No. 399.

By a Consul.

The defendant, in answer to the petition of plaintiff, alleges that at the commencement of this action he was and now is consul of the for the city of, duly accredited and acknowledged as such.

No. 400.

Another Action Pending.

The defendant, in answer to the petition of plaintiff, alleges that at the time this action was commenced there was and ever since has been and now is another action pending in the district court of county, between the same parties as in this action, and for the same cause of action set forth in the petition herein.

No. 401.

Infancy of the Plaintiff.

The defendant, in answer to the petition of the plaintiff, alleges that the plaintiff is an infant, under the age of twenty-one [*if a female under the age of eighteen*] years, and has no guardian appointed herein.

No. 402.

Coverture of the Plaintiff.

The defendant, in answer to the petition of plaintiff, alleges that at the commencement of this action the plaintiff was and now is the wife of one C. D., now living, and that this action does not in any way concern her separate property or business.

No. 403.

Misnomer of Defendant.

C. D., in answer to the petition of the plaintiff, alleges that his true name is C. D., and not E. D., as set forth in said petition.

No. 404.

Misnomer of Plaintiff.

The defendant, in answer to the petition of the plaintiff, alleges that said plaintiff is named and known by the name of, and not by the name of, as set forth in said petition.

No. 405.

Defect of Plaintiffs.

The defendant, in answer to the petition of the plaintiff, alleges that the cause of action set forth in plaintiff's petition did not accrue to the plaintiff alone, but to him and [one E. F., as partners, or] one E. F., who is still living.

No. 406.

Defect of Defendants.

The defendant, in answer to the petition of the plaintiff, alleges that the cause of action set forth in plaintiff's petition did not accrue to the plaintiff against this defendant alone, but jointly with one G. H., who is still living.

No. 407.

The Same on Joint or Partnership Contract.

The defendant, in answer to the plaintiff's petition, alleges that the contract on which this action is brought was not made by the defendant alone, but [as partners], or jointly with one E. F., who is still living.

No. 408.

Nonjoinder of the Owner of the Equity of Redemption in an Action to Foreclose a Mortgage.

The defendant, in answer to the petition of the plaintiff, alleges that on or about the day of, 18..., and after the execution of said mortgage, he, by a deed duly executed and delivered, conveyed said mortgaged premises to one G. H., who still retains the title to the same.

No. 409.

Assignment of Cause of Action to Third Person.

The defendant, in answer to the petition of the plaintiff, alleges that prior to the commencement of this action, to-wit: on or about the day of, 18..., the plaintiff assigned the subject matter of this action, and all right, title, and interest therein, to one G. H., who then became and ever since has been the owner thereof.

No. 410.

Limitations.

The defendant, in answer to the petition of the plaintiff, alleges that the cause of action stated in the petition did not accrue within [*if the contract is in writing*] five years, if verbal [*four years*], next before the commencement of this action.¹

No. 411.

Infancy.

The defendant, by E. F., his guardian *ad litem*, in answer to the petition of the plaintiff, alleges that at the time of making the contract set forth in said petition the defendant was an infant within the age of twenty-one years [*eighteen years if a female*], being at that time but years of age.

No. 412.

Coverture.

The defendant, in answer to the petition of the plaintiff, alleges that before and at the time of making the contract set forth in said petition she was [*and now is*] the wife of,

¹ Where it does not appear on the face of the petition that the claim sued on is barred by the statute of limitations, the statute, if relied on, must be pleaded.

now living, and said contract did not concern her separate property, trade, or business.

No. 413.

Duress.

The defendant, in answer to the petition of the plaintiff, alleges that at the time of making said contract [*in writing*] set forth in said petition he was imprisoned by the plaintiff [*and others in collusion with him*] in the town of, in county, and deprived of his liberty until, by force and restraint of said imprisonment, he made said contract and delivered the same to the plaintiff.

No. 414.

Adverse Enjoyment.

The defendant, in answer to the petition of the plaintiff, alleges that the cause of action set forth in plaintiff's petition did not accrue within ten years next before the commencement of this action.

No. 415.

Claim Against an Estate not Presented for Allowance Within the Time Limited.

The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., the defendant was duly appointed by the county court of county administrator of the goods and estate of [*the decedent*], and accepted said trust, and thereupon said court fixed the day of, 18..., as the time for creditors to present their claims against said estate to the county court for examination and allowance, of which due notice was given as required by law. Said claim was due at the time of the death of said [*decedent*], but was not presented for allowance within two years from the time of the publication of the aforesaid notice, and is therefore barred.

No. 416.

Accord and Satisfaction.

The defendant, in answer to the petition of the plaintiff, alleges that before this action was brought, and after said cause of action accrued, to-wit: on the day of, 18...,* the defendant delivered to the plaintiff, who accepted the same [*state*

what money or property was delivered] of value in full satisfaction and discharge of the debt [*or damages*] by the plaintiff demanded in his petition.

No. 417.

Release.

[*As in preceding form to the*.* Add:]

The plaintiff, in consideration of the sum of \$....., released and discharged the defendant from the claim set forth in his petition. The following is a copy of said release:

[*Copy release.*]

No. 418.

Fraud in Procuring Contract.

The defendant, in answer to the petition of the plaintiff, alleges that the instrument set forth in the petition upon which this action is founded was procured from the defendant by the plaintiff by fraud and misrepresentation in this: [*state the particular circumstances constituting the fraud*].¹ That said representations made by the plaintiff were false and untrue, as he then well knew; but the defendant, relying upon the same, executed and delivered said instrument to the plaintiff.

The defendant therefore prays that said instrument may be declared void, and be delivered up and cancelled.

No. 419.

Insanity of Defendant.

The defendant, in answer to the petition of the plaintiff, alleges that at the time of making the promise set forth in plaintiff's petition the defendant was of unsound mind and entirely incapable of making or understanding a contract,² as the plaintiff well knew.

No. 420.

The Statute of Frauds as to the Leasing or Sale of Real Estate.

The defendant, in answer to the petition of the plaintiff, alleges that neither the defendant nor any person authorized by him ever made or signed any contract, or agreement, or note, or memorandum thereof in writing for the sale [*or leasing*] of said premises or any part thereof to the plaintiff.

¹ See *Arnold v. Baker*, 6 Neb., 184.

² See *Mulloy v. Ingalls*, 4 Neb., 115.

No. 421.

Where Contract Sued On is Void by the Law of the Place where Made.

The defendant, in answer to the petition of the plaintiff, alleges that the contract set forth in said petition was not made in this state, but in the state of, and that by the laws of that state it is provided that [*copy the statute relied on, and state facts showing that the contract falls within its provisions.*¹

No. 422.

Tender of Payment.

The defendant, in answer to the petition of the plaintiff, alleges that before this action was brought, to-wit: on the day of, 18..., he tendered to the plaintiff, in payment of said indebtedness [*or promissory note*], the sum of \$....., which he refused to receive, and the defendant has ever since been and still is ready to pay said sum to the plaintiff, but he has refused to receive the same, and the defendant now brings said sum into court and offers the same to the plaintiff.

No. 423.

Compromise.

The defendant, in answer to the petition of the plaintiff, alleges that before this action was brought, to-wit: on the day of, 18..., the plaintiff demanded [*the subject of the action*] from the defendant, which he refused to pay because [*state facts showing that the claim was doubtful, or the damages unliquidated*], and the parties thereupon, on said day, compromised said claim, the defendant paying the plaintiff the sum of \$..... therefor, which he accepted in full satisfaction and discharge thereof.

No. 424.

Rescission of Contract.

The defendant, in answer to the petition of the plaintiff, alleges that after the contract set forth in the petition was made, and before any breach thereof, it was expressly agreed between the plaintiff and defendant that said contract should be rescinded and abandoned, and it was thereupon rescinded and abandoned accordingly.

¹ See *Kittle v. De Lamater*, 3 Neb., 325.

No. 425.

Discharge in Bankruptcy.

1. The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., he filed a petition in the district court of the United States for the district of, setting forth a list of his creditors and their respective places of residence, and the amount due each, and also an inventory of his property, rights, credits, and effects of every kind and nature, and alleging that he was a resident and citizen of the district of, and was owing debts which had not been created in consequence of a defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and that he was unable to pay said debts, which petition was duly verified by his oath, and prayed to be declared a bankrupt by a decree of said court and discharged from the payment of said debts.

2. That afterwards, to-wit: on the day of, 18..., the defendant was by said court duly adjudged a bankrupt, and afterwards, on the day of, 18..., he filed his petition in said court praying for a discharge from all his debts, and certificate of said discharge. The creditors of the defendant and all parties in interest were duly notified to appear on the day of, 18..., and show cause, and the defendant, having fully complied with all the requirements of the act of congress in relation thereto and the orders of the court, was on the day of, 18..., duly declared by said court entitled to his discharge from his debts and a certificate thereof, and a decree was then and there rendered by said court discharging the defendant from all his debts.

3. The cause of action set forth in the plaintiff's petition was due and owing to the plaintiff before the defendant filed said petition and was declared a bankrupt, and said debt was one provable against his estate in bankruptcy, and from which he was discharged by said proceedings in bankruptcy, and was not created in consequence of a defalcation of a public office, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity.

No. 426.

Arbitration.

1. The defendant, in answer to the petition of the plaintiff, alleges that after the accruing of the cause of action set forth in said petition, and before the commencement of this action, to-wit: on the day of, 18..., the plaintiff and defendant by mutual agreement submitted all and every cause of action existing between them to E. F. and G. H., who were to make and publish their award in writing on or before the day of, 18...

2. Said E. F. and G. H. thereupon entered upon their duties as arbitrators, and after hearing the plaintiff and defendant and the evidence adduced, on the day of, 18..., made and published their award in writing, of which the plaintiff then had due notice. The following is a copy of said award:

[*Copy award.*]

3. The defendant has duly performed all the conditions of said award on his part to be performed.

No. 427.

Fraud in obtaining Judgment.

1. The defendant, in answer to the petition of the plaintiff, alleges that the judgment set forth in said petition was obtained by the plaintiff against the defendant by fraud and misrepresentation in this—that the plaintiff, after the commencement of the action upon which said judgment was obtained, fraudulently represented to the defendant, for the purpose of preventing him from defending said action, that he was about to dismiss said action, and that he would not further prosecute the same, and that the defendant need not employ an attorney nor pay any further attention to it.

2. The defendant, relying upon said representations of the the plaintiff, failed to employ an attorney or to appear at the next term of said court to defend said action.

3. The plaintiff fraudulently appeared at the next term of said court, and without the knowledge of the defendant prosecuted said action and obtained said judgment against the defendant by default.

4. The defendant was not indebted to the plaintiff in the sum claimed in said petition for which judgment was rendered, nor in any sum whatever, and has a complete defense to said action.*¹

No. 428.

Want of Jurisdiction.

The defendant, in answer to the petition of the plaintiff, alleges that no summons was served upon him in the action set forth in the petition upon which said judgment was obtained, nor did he appear in said action either in person or by attorney, and the court had no jurisdiction.

No. 429.

Want of Jurisdiction.

1. The defendant, in answer to the petition of the plaintiff, alleges that when the action upon which the judgment set forth in the petition was recovered was commenced the plaintiff was a non-resident of the state of and absent therefrom.

2. The defendant never appeared in said action either personally or by an attorney, and was never served with summons therein.²

No. 430.

Failure of Consideration.

1. The defendant, in answer to the petition of the plaintiff, alleges that the promissory note set forth in said petition was given for, which the plaintiff sold and delivered to the defendant, and for no other consideration whatever.

2. The plaintiff had no title to said at the time he sold and delivered the same to the defendant, but it was the property of, who on the day of, 18..., claimed said property and recovered the same in an action of replevin.

3. The defendant has therefore received no consideration for said note.

* It should appear that the party asking the aid of equity against the enforcement of the judgment has a good defense to the claim upon which the action was founded. High on Injunctions, §§ 88, 89.

¹ See *Eaton v. Hasty*, 6 Neb., 419.

² A judgment *in rem* is not, in another state, even *prima facie* evidence of debt. *Arndt v. Arndt*, 15 Ohio, 32. Wells' Res Adjudicata, page 504.

No. 431.

Want of Consideration when Promissory Note has been Transferred.

1. The defendant, in answer to the petition of the plaintiff, alleges on information and belief that the plaintiff purchased said note on or about the day of, 18..., and after said note had become due.¹

2. The defendant further alleges that said note was made and delivered by the defendant to in consideration of a certain patent right for a pretended improved buggy spring which said represented was a new and valuable improvement in buggy springs, and of the value of \$....., and the defendant, relying upon said representations, purchased said patent right of said and made and delivered to him the note in question, the sole consideration therefor being said patent right.

3. Said patent right was void for want of novelty and no improvement whatever on former methods of preparing buggy springs, as said well knew at the time of said sale, and was of no value whatever, and the defendant has received no consideration for said note.

4. The defendant denies each and every allegation in said petition inconsistent with the foregoing statement.

No. 432.

Acceptance for Accommodation of the Plaintiff.

The defendant, in answer to the petition of the plaintiff, alleges that he accepted the bill set forth in said petition for the sole accommodation of the plaintiff, and that there was no value or consideration for the acceptance or payment thereof by the defendant.

No. 433.

Novation by Substitution of New Creditor.

1. The defendant, in answer to the petition of the plaintiff, alleges that on or about the day of, 18..., the plaintiff requested him to make and deliver to E. F. the defendant's promissory note for the sum of \$....., payable to said E. F. or order, the same to be in full discharge of the defendant's debt

¹ This form of pleading seems to be permissible in cases where the pleader can have no positive information as to the facts alleged.

to the plaintiff of the amount set forth and claimed in said petition.

2. In pursuance of said request of the plaintiff the defendant on said day made and delivered his promissory note for the sum of \$..... to said E. F., who accepted the same.

No. 434.

Part Payment, and Deficiency in Goods Exceeding the Balance.

1. The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., he paid to the plaintiff the sum of \$..... on account of the goods set forth in said petition, and that he re-delivered to the plaintiff the following articles therein described [*describe them*], of the value of \$.....

[*Second defense.*]

1. As a second defense the defendant alleges that among the articles furnished by the plaintiff to the defendant, and included in said petition, were one, three, four, which were charged in gross at the sum of \$.....

2. It was agreed between the plaintiff and defendant that [*set out the contract in detail*].

3. Said goods upon examination were found to be imperfect, and did not conform to the quality of goods purchased, in this: [*state the defects*], and the defendant at once notified the plaintiff to take said goods away and replace them with unobjectionable goods, which he then refused and still refuses to do, although the defendant at all times has been and still is ready to deliver the same to him.

4. Said goods, if perfect and conformed to the contract, would be of the value of \$....., but are worth not to exceed the sum of \$.....

The defendant therefore prays, etc.

No. 435.

Counterclaim, Breach of Warranty.

1. The defendant, in answer to the petition of the plaintiff, alleges that the note set forth in said petition was made and delivered by the defendant to one E. F., at that time the agent of the plaintiff, and in exchange for the following goods: [*describe*

them], sold by sample to the defendant by said E. F. as such agent of the plaintiff.

2. Said goods were delivered to the defendant on the day of, 18..., but did not correspond with the samples in this [*state wherein they failed to correspond*], and were worth not to exceed \$.....

3. As soon as defendant discovered that said goods were not of as good quality as the samples he notified said agent [*or the plaintiff*] thereof, and offered to return said goods, and is still ready to do so.

The defendant therefore prays that \$....., the amount of said damages sustained by him, may be deducted from the amount of said note.

No. 436.

On Note Given for Diseased Horse.

1. The defendant, in answer to the petition of the plaintiff, alleges that said note was given for a horse purchased by the defendant of the plaintiff, and that the plaintiff, in making said sale, represented to the defendant that he was well acquainted with the diseases of horses, and that said horse was entirely free from disease; and the defendant, being unacquainted with the diseases of horses, and relying upon said representations of the plaintiff, purchased said horse.

2. The defendant, at the time he purchased said horse, was about to open a livery stable in the town of, and was the owner of twenty horses, to be used in said business at said stable, and desired to use the horse purchased of the plaintiff with his other horses, of which the plaintiff was duly notified at the time of said sale.

3. Said horse was not free from disease at the time the plaintiff purchased the same, but was diseased with, which is contagious, and before the defendant had knowledge that said horse was diseased, and while being kept in the same stable with his other horses, the latter caught the disease from contact with the horse purchased from plaintiff, and [*state special damages*].

4. By reason of which the defendant has sustained damages

in the sum of \$....., which he prays may be deducted from the amount of said note.

No. 437.

By Surety Alleging that the Payee has Extended the Time of Payment.

The defendant, in answer to the petition of the plaintiff, alleges that about the time of the maturity of said note, to-wit: on or about the day of, 18..., the plaintiff, for a valuable consideration, and without the consent of the defendant, entered into an agreement with [*the maker*], whereby he agreed to extend, and did extend, the time for the payment of said note until the day of, 18....¹

No. 438.

By Surety Asking to be Subrogated to Securities in the Hands of the Plaintiff.

1. The defendant E. F., in an answer to the plaintiff's petition, alleges that the note set forth in said petition was signed by the defendant as surety for [*the co-defendant*], as the plaintiff well knew.

2. On the day of, 18..., said [*co-defendant*], to secure the payment of said note, executed and delivered to the plaintiff a mortgage upon the [*describe premises*], which security the plaintiff still holds, and which is ample to pay the plaintiff's claim.

3. The [*co-defendant*] is insolvent and entirely unable to pay said note, except as the amount thereof may be made from said mortgaged property.

4. On the day of, 18..., the defendant offered to pay said note, with interest and costs to that date, and demanded of the plaintiff an assignment of said mortgage, but the plaintiff refused to assign the same to defendant, alleging that he holds said mortgage as security for another note held by him against [*the co-defendant*].

5. The plaintiff is a non-resident of this state, and the defendant will be remediless unless said mortgage is assigned to him as security.

The defendant therefore prays that upon his paying said note

¹ *Burr v. Boyer*, 2 Neb., 275. *Dillon v. Russell*, 5 Id., 484.

with interest and costs the plaintiff may be required to assign said mortgage to him and for such other relief as equity may require.¹

No. 439.

Building Contract.

1. The defendant, in answer to the petition of plaintiff, alleges that the work set forth in said petition was performed under a contract, of which the following is a copy:

[*Copy contract.*]

2. The plaintiff has not completed said work in accordance with said contract in this [*state in what the failure consists*], and said work is still incomplete and unfinished.

3. The defendant has obtained no certificate from A. B., the architect mentioned in said contract, that said contract has been completed to his satisfaction.²

No. 440.

Failure to Obtain Architect's Certificate.

The defendant, in answer to the petition of the plaintiff, alleges that the work set forth in said petition was to be completed in a good workmanlike manner by the day of, 18..., to the satisfaction of, the architect, agreed upon in said contract, and his certificate obtained by the plaintiff that the same was completed to his satisfaction. But said work is still incomplete and unfinished, and said plaintiff has not obtained the certificate of said architect that said work is finished as provided in said agreement.

No. 441.

Departure from Guaranty of Payment of Goods Sold to Third Party.

1. The defendant, in answer to the petition of the plaintiff, alleges that he did not agree to be answerable to the plaintiff for goods sold generally and without limit to, but only for the bill of goods sold to said on the day of, 18..., amounting to the sum of \$....., and did not agree to be answerable for the price of the goods set forth in said petition.

2. The defendant denies each and every allegation in said petition inconsistent with the statements in the above answer.

¹ See *Burr v. Boyer*, 2 Neb., 275.

² See *Mercer v. Harris*, 4 Neb., 82. *School District v. Randall*, 5 Id., 408.

No. 442.

Alteration of Contract.

The defendant, in answer to the petition of the plaintiff, alleges that after the making, signing, and delivering of said contract [*or promissory note*], the plaintiff, without the consent or knowledge of the defendant, willfully altered the same in a material part, as follows: [*state the alteration*]. The defendant denies that the contract set forth in said petition is the contract of the defendant.

No. 443.

Policy Obtained by Misrepresentation.

The defendant, in answer to the petition of the plaintiff, alleges that the defendant was induced to make and subscribe the policy set forth in the petition by the fraudulent misrepresentations made by the plaintiff to the defendant of the following facts material to said risk, and material to be known to the defendant, viz.: [*state misrepresentation*].

No. 444.

Fraud in Obtaining Policy of Life Insurance.

1. The defendant, in answer to the petition of the plaintiff, alleges that [*the insured*], in order to induce the defendant to make and subscribe said policy of insurance, falsely and fraudulently represented to defendant that at the time of the delivery of his declaration to the defendant he was in good health, and was not affected with any hereditary or other disease tending to shorten life, and the defendant, relying upon said representations, issued said policy.

2. [*The insured*] was not then in a good state of health, but had been and was afflicted with [*bronchitis*], a disease that does tend to shorten life.¹

No. 445.

Eviction as a Defense in an Action for Rent.

The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., and after the making

¹ It is an anomaly in the law of contracts to permit the insurer to retain the premiums and refuse to perform the contract.

of the lease set forth in said petition, and before any part of the rent demanded in said petition became due, the plaintiff, with force and arms, entered upon said premises and ejected and expelled the defendant therefrom, and has since kept him out of the possession thereof.

No. 446.

Surrender of the Lease.

The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., and after the making of the lease set forth in said petition, and before any part of the rent demanded in said petition became due,* the defendant surrendered said premises and all his right, title, and interest in said lease to the plaintiff, who accepted the same, and has since had possession of said premises.

No. 447.

Lessor Accepted Assignee of Lessee as Tenant.

1. Follow the preceding form to the *, then add—

The defendant duly assigned all his right, title, and interest in said lease to one E. F., who thereupon took possession of said premises under said lease.

2. On the day of, 18..., the plaintiff was duly notified of said assignment, and thereupon agreed to accept said E. F. as his tenant of said premises, and to look solely to him for the rent thereof.

No. 448.

Denial that the Plaintiff Duly Performed on His Part.

The defendant, in answer to the petition of the plaintiff, denies that the plaintiff has performed the conditions of said agreement on his part, but on the contrary he has wholly failed to perform the same, in this: [*state specifically wherein he has failed, as in a petition*].

No. 449.

Where the Failure of the Plaintiff Prevented the Defendant Performing.

1. The defendant, in answer to the petition of the plaintiff, alleges that at the time of making the contract set forth in said petition, and as a part of the consideration therefor, the plaintiff

was to build the mill-house complete and have it ready for the machinery by the fifteenth day of October, 1871. The defendant was thereupon to furnish the machinery for said mill and the lumber and material necessary for putting up said machinery, and have the same completed on or before the first day of December, 1871.

2. The plaintiff wholly failed to erect said mill-house, and on or about the first day of November, 1871, the defendant requested said plaintiff to erect the same, which he then refused and still refuses to do, whereby the defendant was prevented from performing said contract.¹

No. 450.

Performance on the part of the Defendant.

The defendant, in answer to the petition of the plaintiff, alleges that on or about the day of, 18..., he made and delivered [or tendered] to the plaintiff the described and set forth in said petition, and ever since has been and now is ready and willing to deliver the same to the plaintiff.

No. 451.

Denial of Refusal to Marry on Request.

The defendant, in answer to the petition of the plaintiff, denies that he has refused to marry the plaintiff, but alleges that since the day of, 18..., he has at all times been and now is ready and willing to marry her, as she well knew.

No. 452.

Bad Character of the Plaintiff.

The defendant, in answer to the petition of the plaintiff, alleges that at the time of making the promise set forth in the petition the plaintiff was unchaste, and generally reported among those intimately acquainted with her so to be, but the defendant at that time was wholly ignorant that such was her character, and as soon as he was informed thereof he refused to marry her.

No. 453.

Misconduct of the Plaintiff.

The defendant, in answer to the petition of the plaintiff, al-

¹ See *Holmes v. Wilhite*, 3 Neb., 160.

leges that after the making of the promise set forth in said petition, to-wit: on the day of, 18..., the plaintiff, without the knowledge or connivance of the defendant, had carnal connection with one C. D., at the residence of one A. B., and the defendant, upon being informed thereof, refused to marry her.

No. 454.

Justifying Trespass.

1. The defendant, in answer to the petition of the plaintiff, alleges that at the time of taking said goods mentioned in said petition he was the sheriff of county.

2. At the, 18..., term of the court of county, one A. B. commenced an action of replevin against C. D. to recover the possession of the goods described in the petition, and an order of delivery was duly issued in said cause, of which the following is a copy: [*copy order of delivery*], and was delivered to the defendant, who thereupon seized said goods under said order, and upon the execution and delivery to him of the following undertaking [*copy undertaking*] by the said A. B., which was duly approved, re-delivered said goods to the said A. B.

3. The defendant took and delivered said goods under said proceedings in replevin and in no other manner.

No. 455.

Justification under Execution.

1. The defendant, in answer to the petition of the plaintiff, alleges that at the July, 1878, term of the district court of Hall county, one A. B. recovered a judgment against C. D. for the sum of \$....., and for \$..... costs of suit, and that on the day of, 18..., an execution in due form of law was duly issued out of said court and directed to the defendant, who at that time was the sheriff of said county, for service. The following is a copy of said execution:

[*Copy execution.*]

2. Said execution was thereupon delivered to the defendant, who, as sheriff of said county, levied the same upon the goods and chattels mentioned in said petition, which goods at the time of said levy were the property of [*the judgment debtor*].

3. The defendant denies each and every allegation in said petition inconsistent with the statements in the above answer.

No. 456.

Recapture of Debtor after an Escape.

1. The defendant, in answer to the petition of the plaintiff, alleges that said [debtor] wrongfully and without the privity or consent of the defendant made his escape from the custody of the defendant.

2. On the day of, 18..., and before the commencement of this action, the defendant captured and retook said [debtor] into his custody, where he has ever since been held under the process set forth in said petition.

No. 457.

Lien for Storage.

1. The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., the plaintiff deposited the goods set forth in said petition with the defendant as warehouseman to be stored in his warehouse, the plaintiff agreeing to pay therefor the sum of \$..... per month.

2. There is now due from the plaintiff to the defendant for said storage the sum of \$.....

3. The defendant at all times has been and now is ready to deliver said goods to the plaintiff upon the payment of said sum, but the plaintiff has failed to pay or tender the same to the defendant.

No. 458.

Lien of an Agister.

1. The defendant, in answer to the petition of the plaintiff, alleges that before and at the time of making the contract hereinafter set forth, the defendant had a lien upon said horses to the amount of \$....., for breaking, training, feeding, and caring for the same, and had possession of said horses.

2. While said horses were thus in possession of the defendant and before the sale hereinafter mentioned, the plaintiff and defendant entered into an agreement that the defendant should sell said horses for the highest price he could obtain and retain the amount due him for training and taking care of the same.

3. In pursuance of said agreement the defendant sold said horses for the sum of \$....., being the highest price he could obtain; and immediately notified the plaintiff of said sale, and tendered to him the sum of \$....., being the price of said horses, less the sum due defendant, which he refused and still refuses to receive.

No. 459.

Bona fide Purchaser of Real Estate Without Notice.

1. The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., one C. D. was in possession of the following described real estate, to-wit: [*describe it*], being the property set forth in said petition, and claimed to be the owner thereof in fee.

2. The defendant, believing said C. D. to be the owner thereof, on said day purchased said real estate from him for the sum of \$....., and received from him a deed of that date, duly executed and acknowledged, which deed contained a covenant that he was seized in fee of said premises, and that they were free from incumbrances.

3. On the day of, 18..., the defendant actually paid said C. D. the sum of \$..... for said land, and he had no notice whatever at the time of receiving said deed or of the payment of said purchase money of any claim, right, title, or interest of the plaintiff, or of any other person in said real estate except C. D.

No. 460.

Disclaimer of Title.

The defendant, in answer to the petition of the plaintiff, disclaims all right, title, and interest in or to said real estate or any part thereof.

No. 461.

Overdrawing Account by Partner Done by Assent of Co-partner.

1. The defendant, in answer to the petition of the plaintiff, alleges that the funds set forth in said petition, which were drawn by the defendant in excess of his share of the profits thereof, to-wit: the sum of \$....., were drawn with the full knowledge, consent, and approbation of the plaintiff.¹

¹ See *McCormick v. McCormick*, 7 Neb., 440.

The defendant denies each and every allegation set forth in the [third] count of said petition.

No. 462.

Partnership Not Terminated.

1. The defendant, in answer to the petition of the plaintiff, alleges that the partnership set forth in said petition was formed and carried on under an agreement in writing, of which the following is a copy:

[*Copy agreement.*]

2. The partnership set forth in said agreement is the same as is set forth in said petition, and has never been altered or changed in any manner, and the time fixed for the termination of the same has not yet arrived.

No. 463.

Non-Joinder of the Owner of the Fee in Actions of Foreclosure.

The defendant, in answer to the petition of the plaintiff, alleges that after the execution of the mortgage set forth in said petition, and before this action was commenced, to-wit: on the day of, 18..., the defendant, being the owner of the fee, conveyed said premises, subject to said mortgage, by a deed duly executed and acknowledged to one C. D., who is now the owner of the equity of redemption thereof, and should be made a party defendant.

No. 464.

To Have Mortgaged Premises Sold in the Inverse Order of their Alienation.

1. The defendant, in answer to the petition of the plaintiff, alleges that after the making of the mortgage set forth in said petition, to-wit: on the day of, 18..., [the mortgagor] sold and conveyed to the defendant a portion of said mortgaged premises, described as follows: [*describe property conveyed*].

2. The defendant further alleges that after the sale and conveyance of the above described real estate to the defendant said [mortgagor] sold and conveyed an undivided half of the residue of said premises to one E. F.

The defendant therefore prays that the premises still remaining in the name of the mortgagor be first sold under the decree

of foreclosure, and in case of deficiency that the portion conveyed to E. F. be next sold, and that the premises conveyed to this defendant be not sold unless for a deficiency existing after said sales.

No. 465.

Denial of Title in Real Action.

The defendant, in answer to the petition of the plaintiff, denies that said plaintiff is seized in fee simple, or is the owner of the lands and tenements demanded in his said petition, or is entitled to the possession thereof.

No. 466.

The Same.

The defendant, in answer to the petition of the plaintiff, denies that the plaintiff has a legal estate in the premises described in said petition, or is entitled to the possession thereof.

No. 467.

Real Action, Agreement to Convey; Counterclaim.

1. The defendant, in answer to the petition of the plaintiff, alleges that on or about the day of, 18..., the plaintiff executed and delivered to him an agreement in writing, duly signed, for the sale and conveyance to the defendant of the premises described in plaintiff's petition. The following is a copy of said agreement:

[*Copy agreement.*]

2. The defendant duly performed all the conditions of said agreement on his part [*set out the facts as in an action for specific performance*].

The defendant therefore prays that said plaintiff may be required to convey said premises to the defendant in the manner provided in said agreement, and that he be restrained from further prosecuting this action.

No. 468.

Mistake in Deed.

1. [*As in preceding form.*]

2. The defendant fully performed all the conditions of said

agreement on his part, and on the day of, 18..., the plaintiff executed and delivered to him a deed duly executed, intending thereby to convey the premises described in said agreement to the defendant, but by mistake described said premises as follows:

[*Description.*]

3. The defendant supposed that said deed included and conveyed to him the premises described in the aforesaid agreement, and accepted it.

4. The premises described in and demanded in said petition are a part of the premises described in said agreement, which by mistake was omitted from said deed.

5. On the day of, 18..., the defendant discovered said mistake, and immediately thereafter applied to the plaintiff to correct the same by conveying the land so omitted from the deed, which he refused to do.

The defendant therefore prays that the plaintiff be required to convey to defendant the land so omitted from said deed by mistake, and that he be restrained from further prosecuting this action.

No. 469.

Deed Delivered as an Escrow.

1. The defendant, in answer to the petition of the plaintiff, alleges that the defendant delivered said deed to one E. F., who was not the agent of plaintiff, as an escrow, to be kept by him upon condition that if the plaintiff within three months from that date should pay the sum of \$....., for said land, said deed then should thereupon be delivered to him, otherwise to be returned to the defendant.

2. Said plaintiff did not pay said sum of \$....., nor any part thereof, for said land, nor has he yet paid the same, but on or about the day of, 18..., said E. F., without requiring said payment, and without authority from the defendant, surrendered said deed to the plaintiff, but said deed has never been delivered by the defendant to the plaintiff, and said deed is the same under which the plaintiff claims title.

3. The defendant denies each and every allegation in said petition inconsistent with the above facts.

No. 470.

Set-off.

1. The defendant, in answer to the petition of the plaintiff, alleges that said plaintiff, at the commencement of this action, was and now is indebted to him in the sum of \$..... upon an account for goods sold and delivered by the defendant to the plaintiff at his request. The following is a copy of said account:

[*Copy account as in an action on an account.*]

2. There is now due from the plaintiff to the defendant upon said account the sum of \$....., which the defendant prays may be set-off against the claim of the plaintiff set forth in said petition, and that the defendant have judgment against the plaintiff for the balance, amounting to the sum of \$.....

No. 471.

Set-off of Debt due from Principal Debtor in Action against Principal and Sureties.

1. The defendant E. F., in answer to the petition of the plaintiff, alleges that he is the principal debtor in the claim set forth by the plaintiff in his petition, and the other defendants are merely sureties thereon.

2. On the day of, 18..., the plaintiff made and delivered to the defendant a promissory note in writing, of which the following is a copy: [*copy note and proceed as in an action on the note, and prayer as in preceding form*].

No. 472.

Counter-claim.

1. The defendant, in answer to the petition of the plaintiff, alleges that the note set forth in said petition was given for a threshing machine, and for no other consideration whatever.

2. To induce the defendant to purchase the same and make and deliver said note to the plaintiff for said machine he represented to defendant that said machine was entirely new, had never been run, and was well supplied with belts, levers, etc., and a first-class machine in all respects, and of the value of \$....., and he thereupon warranted said machine to be as above represented.

3. The defendant did not see said machine, but relying upon said representations of the plaintiff, thereupon purchased the same for the sum of \$....., and made and delivered to him the the note in question.

4. Said machine was not new at the time the defendant purchased the same, but on the contrary had been run years, was not sound, and lacked the necessary belts for running the same, as the plaintiff knew at the time he made said representations and warranty, and was worth not to exceed the sum of \$.....

The defendant therefore prays that the sum of \$....., his damages so as aforesaid sustained, may be set-off against said claim of the plaintiff.

No. 473.

Counter-claim for Divorce.

First defense.

[*State facts to defeat plaintiff's right to a divorce.*]

Second defense.

The defendant, for a second defense and as cause for a divorce, alleges that on the day of, 18..., the plaintiff committed adultery with one, at the house of one, in the town of, and such adultery was committed without the consent of the defendant, who, upon discovering that such adultery had been committed by said plaintiff, refused further to cohabit with him [*or her*], and has not cohabited with him [*or her*] since that time.

The plaintiff therefore prays, etc. [*as in a petition for a divorce*].

No. 474.

Condonation.

1. The defendant, in answer to the petition of the plaintiff, alleges that after the times set forth in said petition and before the commencement of this action, the plaintiff, having full notice of all the matters therein set forth, freely condoned said alleged and cohabited with the defendant.

2. The defendant from the time of said condonation until

the present time has been a faithful, kind, and indulgent husband to the plaintiff.

No. 475.

Satisfaction by One of Two or More Joint Trespassers.

1. The defendant E. F., in answer to the petition of the plaintiff, alleges that the trespasses set forth in said petition were committed by this defendant jointly with one G. H.

2. On the day of, 18..., and after the commencement of this action, it was agreed by and between the plaintiff and said G. H. that said G. H. should pay the plaintiff the sum of \$..... in full satisfaction and discharge of said trespasses, damages, and costs, which sum was then duly paid to the plaintiff and accepted by him in full satisfaction of said trespasses, damages, and costs.

No. 476.

The Plaintiff Made the Assault. [Son Assault Demesne.]

1. The defendant, in answer to the petition of the plaintiff, alleges that at the time set forth in said petition, and immediately before the time of the commission of the alleged assault therein stated, the plaintiff with force and arms made an assault upon the defendant, and would have beaten and ill-treated him if he had not defended himself against the plaintiff; wherefore he did then and there defend himself against the plaintiff as he lawfully might, and in doing so necessarily and unavoidably beat the plaintiff, and the acts above set forth are the same of which the plaintiff complains in said petition.

No. 477.

To Preserve the Peace. [Molliter Manus Imposuit.]

1. The defendant, in answer to the petition of the plaintiff, alleges that at the time set forth in said petition the plaintiff made an assault on one E. F., and was then and there striking him; and the defendant, in order to preserve the peace and prevent the plaintiff and E. F. from injuring each other, in order to separate and part them, gently laid his hands upon the plaintiff for the purpose aforesaid, and the acts above set forth are the same of which the plaintiff complains in said petition.

2. The defendant denies each and every allegation in said petition contained except as above admitted.

No. 478.

The Same.

[*If the plaintiff assaulted the defendant, copy 1 in preceding form.*]

2. The plaintiff thereupon assaulted the defendant, and the defendant, in necessary self-defense, unavoidably beat and bruised the plaintiff a little, etc.

[*Continue as in preceding form.*]

No. 479.

Self-defense and Counter-claim for Damages.

1 and 2. [*As in form No. 476.*]

Counter-claim.

3. The plaintiff, on said day, while the defendant was defending himself as hereinbefore set forth, struck the defendant on the right arm with a heavy stick, thereby bruising and wounding said arm, etc. [*Continue as for special damages for an assault.*]

No. 480.

Removal of Passenger from Railroad Car for Refusal to Pay Fare.

1. The defendant, in answer to the petition of the plaintiff, alleges that at the time of the alleged assault set forth in said petition the defendant was the conductor and had charge and control of a train on the railroad, running from to

2. The rules of said railroad company provide that no person shall be permitted to ride on the cars of said railroad without having purchased a ticket entitling him to passage thereon, or paying the lawful fare demanded by said railroad company.

3. The defendant, at the time set forth in said petition, was on the cars on said railroad so in charge of the defendant without having a ticket entitling him to passage on said road, and without having paid his fare, and when requested by the defendant to pay said fare refused to do so.

4. The train was thereupon stopped and the plaintiff requested to leave the cars, which he refused to do, whereupon the defendant, using no more force than was necessary, removed him therefrom, and the acts above set forth are the same of which the plaintiff complains in said petition.

No. 481.

Justification in False Imprisonment by a Private Person upon Suspicion of a Felony.

1. The defendant, in answer to the petition of the plaintiff, alleges that on the day of, 18..., the horse of one E. F., of the value of \$....., had been stolen and feloniously taken away from county.

2. [*State the causes of suspicion against the plaintiff.*] - 2nd 1.

3. The defendant having good and probable cause to suspect that the plaintiff committed said felony, arrested him and took him before E. F., a justice of the peace of county, to be examined and dealt with according to law, and the acts above set forth are the same of which the plaintiff complains in said petition.¹

No. 482.

Justification by an Officer for an Arrest upon Suspicion of a Felony.

1. The defendant, in answer to the petition of the plaintiff, alleges that before and at the time stated in said petition the defendant was sheriff of county.

2. At the time aforesaid the defendant was informed [*by telegraph*] that a murder had been committed on the preceding day in county, and [*state the grounds of suspicion of the plaintiff*].

3. Believing said information to be true, and that the plaintiff was the person who committed the crime, the defendant arrested him and took him before E. F., a justice of the peace of county, to be examined and dealt with according to law, and the acts above set forth are the same of which the plaintiff complains in his petition.

¹ A private person without a warrant cannot justify unless a crime has actually been committed.

No. 483.

By Officer for Arrest under Criminal Process.

1. [As in preceding form.]

2. On said day a warrant was duly issued under his hand by E. F., a justice of the peace of county, directed to the sheriff or any constable of said county, and was then and there delivered to the defendant as such officer, whereby he was required to arrest the plaintiff. [State the substance of the warrant.]

3. By virtue of said warrant the defendant did arrest said plaintiff, and took him before said E. F., justice of the peace, to answer to the complaint aforesaid, and the acts above set forth are the same, of which the plaintiff complains in his petition.

No. 484.

Justification of Slander where the Charge is Specific.

1. The defendant, in answer to the petition of the plaintiff, alleges that the supposed defamatory words set forth in said petition are true.

No. 485.

When the Charge is General.

1. [As in preceding form.]

2. Before the supposed defamatory words set forth in said petition were spoken, to-wit: on or about the day of, 18..., the plaintiff did feloniously steal and carry away fifty bushels of wheat, the property of the defendant, of the value of \$.....

No. 486.

Mitigation of Libel.

The defendant, in answer to the petition of the plaintiff, alleges in mitigation that said supposed libelous article was, on the day of, 18..., published in the, a newspaper published in the city of, and was afterwards copied and published by the defendant as a matter of public news, the defendant believing the same to be true, and the same was not published maliciously or with intent to injure the plaintiff.

No. 487.

Privileged Communication.

1. The defendant, in answer to the petition of the plaintiff, alleges on the day of, 18..., during the progress of a trial in the court of county, in an action pending in said court, wherein A. B. was plaintiff and C. D. defendant, one E. F., attorney for said C. D., made an argument in the case to the jury, which argument the defendant, as publisher of the, printed and published in said newspaper as a part of the judicial proceedings had on said trial, and the publication above set forth is the same publication of which the plaintiff complains in said petition.

2. The defendant denies that he published the same with the intent charged in the petition, or maliciously or with intent to injure the plaintiff.

No. 488.

License.

The defendant, in answer to the petition of the plaintiff, alleges that he committed the alleged trespasses complained of by the plaintiff in his petition by the leave and license of said plaintiff, given and granted to the defendant for that purpose.

No. 489.

Right of Way.

1. The defendant, in answer to the petition of the plaintiff, alleges that before and at the time of committing the alleged trespasses, set forth in said petition, there was and for years had been a public highway through and over the premises of the plaintiff, described in said petition, free for all travelers to pass and repass at pleasure.

2. On the day of, 18..., the defendant, with his horses and wagon, did pass along said highway, and found the same obstructed by a fence, which had been wrongfully erected by the plaintiff across the same.

3. The defendant thereupon pulled down said obstruction, and removed the same out of the way, and left it for the use of the plaintiff, and doing no unnecessary injury to the same.

4. The acts above set forth are the same, of which the plaintiff complains in his petition.

No. 490.

Road Founderaus.

1. [*As in preceding form, changing the same to conform to the facts.*]

2. On the day of, 18..., the public highway adjoining said premises of the plaintiff was so miry, founderaus, and out of repair, that it was impossible for the public to pass over the same with carriages and wagons.

3. The defendant on said day having occasion to pass along said highway adjoining the premises of plaintiff with his horses and wagon, and finding said road impassable for the causes aforesaid, took down plaintiff's fence, and with his horses and wagon passed around the aforesaid founderaus portion of said road, and returned again on passing the same into the public road, doing no unnecessary damage in passing over said premises of the plaintiff.

4. [*Copy 4 in preceding form.*]

No. 491.

Answer in Quo Warranto.

1. The defendant, in answer to the information of the relator, alleges that at the election held in the ward of said city of, on the day of, 18..., for the office of councilman, the defendant received four hundred and ten votes, and the relator three hundred and eighty-six votes, and that thereupon the defendant was declared duly elected to said office of councilman of said city.

2. The defendant further alleges that at said election the officers to be elected from said ward were, one councilman and one member of the board of education, and that a number of tickets containing the name of the relator were in the following form: "Ward ticket. A. L. W. and C. E. D.", but having no designation of office thereon, which tickets were rejected and not counted for the relator.

3. The defendant denies that the relator was elected to said office of councilman, or has any right or claim thereto, but al-

leges that the defendant was lawfully elected to said office, and is now lawfully executing the duties thereof.

The defendant therefore prays that said office and its privileges and franchises may be adjudged to him, and for his costs.

CHAPTER XXI.

DEMURRER TO THE ANSWER. REPLY.

No. 492.

Form of Demurrer to Answer.

In the District Court of..... County.

William Hutchinson, plaintiff, }
 v.
 Henry Mathewson, defendant. }

The plaintiff demurs to the answer [*or the first, second, third, etc., defense of the answer*] of the defendant because the facts stated therein are not sufficient to constitute a defense to the action.

WILLIAM HUTCHINSON,

By S. J., *his Attorney.*

No. 493.

Demurrer to Counter-claim or Set-off.

The plaintiff demurs to the counter-claim [*or set-off*] stated in the answer [*or the first, second, etc., defense of the answer*] for the following reasons:

1. The court has no jurisdiction of the subject matter of said set-off.

2. The facts stated therein are not sufficient to constitute a defense to the action.

W. H.,

By S. J., *his Attorney.*

No. 494.

Reply—General Denial.

In the District court of County.

William Hutchinson, plaintiff, }

v.

Henry Mathewson, defendant. }

The plaintiff, in reply to the answer of the defendant, denies each and every allegation therein contained.

No. 495.

Special Denial.

The plaintiff, in reply to the answer of the defendant, denies [state what allegations are denied, as in an answer].

No. 496.

Reply. New Matter and Denial.

1. The plaintiff, in reply to the answer [or to the first, second, third, etc., of the answer] of the defendant, alleges [set forth the new matter constituting a defense not inconsistent with the petition].

2. In reply to the [first or second defense] of the answer the plaintiff denies each and every allegation therein contained.

CHAPTER XXII.

TRIAL.

A trial is the judicial examination of the issues, whether of law or fact. Code, § 279.

Issues of law must be tried by the court unless referred as provided in section two hundred and ninety-eight.

Issues of fact arising in actions for the recovery of money or of specific real or personal property shall be tried by a jury, unless a jury is waived or a reference is ordered as hereinbefore provided. Id., § 280.

All other issues of fact shall be tried by the court subject to its power to order any issue or issues to be tried by a jury, or referred as provided in the code. Id., § 281.

Time of Trial. Section 323 provides that the trial docket shall

be made out by the clerk of the court at least twelve days before the first day of each term of the court, and actions shall be set for particular days, in the order in which the issues are made up, whether of law or fact, and so arranged that the cases set for each day shall be tried as nearly as may be on that day, etc.

No case should be placed on the trial docket unless it is at issue at least twelve days before the term. But a case is at issue when either party is in default. Cases where the issues are made up after the time of making out the docket, and before the first day of the term, may undoubtedly be placed on the trial docket and tried in their order.

IMPANELING THE JURY.

Section 660 of the code provides for drawing the names of twenty-four persons who shall be the petit jurors. The clerk should write the names of the persons thus selected on separate ballots, alike in size and appearance, and put them in a box especially provided for that purpose.

No person thus drawn should under ordinary circumstances be excused except in case of the sickness of himself or family. The plea of pressure of business so often interposed is not generally a sufficient excuse. Service upon a jury is a duty which every citizen owes to the state whose laws protect him and his property, and the duty should be cheerfully performed. Satisfactory verdicts can be obtained only by securing impartial and intelligent jurors.

If from any cause a portion of those selected are excused the court should order the summoning of a sufficient number of talesmen from the body of the county to make the required number.

Challenges to the array are an exception to the whole panel. Such a challenge is in general founded upon some error or manifest partiality committed in obtaining the panel, and which from its nature applies to all the jurors so obtained. 1 Bouvier's Law Dict., 253. The objection must be made before the jury are impaneled or sworn.

When a jury is required the clerk will draw, one at a time, twelve names from the box, calling each name as it is drawn.

The persons thus drawn will immediately take their seats in the jury box. At common law, as a general rule, no challenge could be made until the appearance of a full jury, and the code does not seem to have changed the rule. At common law the mode of determining the qualifications of a juror upon the suggestion of the cause for challenge was by the appointment of triers, the triers to examine the juror challenged and to decide upon his fitness. The office has no existence in this state, the judge acting in their place. The judge may examine the juror upon oath and summarily pass upon his qualifications, his decision thereon being subject to review. See *Curry v. The State*, 4 Neb., 545.

No. 497.

Oath of Juror when Challenged.

You do solemnly swear that you will answer truly all questions put to you touching your qualifications to serve as a juror in the case of A. B. v. C. D., so help you God.

The usual course has been to administer the oath to all the jurors called before their examination. The attorney for the plaintiff and then the attorney for the defendant will proceed to examine them touching their qualifications. When challenges are sustained other names are to be drawn from the box to fill the panel. As to challenges for cause see 1 Bouvier's Law Dict., page 254. 3 Blackstone Com., 364.

After the jury has been passed for cause each party is entitled to three peremptory challenges, and no reason need be assigned for the exercise of this right. The right to peremptory challenges does not exist in this state by virtue of any statute, but alone from the practice of the courts, and as a means of securing an impartial jury. It is a valuable right that should be the subject of legislative enactment.

If it is necessary for the court to order the summoning of talesmen, the utmost care should be taken to secure impartial, fair-minded men. When we consider that on almost every jury there will be found one or more talesmen, the importance of selecting impartial men will readily be seen.

In the administration of justice in the district court, next in importance to a capable, impartial, fearless judge is the selection

of a sheriff who will fearlessly and impartially discharge his duty. No man should be selected as a talesman who is known to be in favor of one of the parties litigant, or opposed to either. And if a sheriff knowingly select such he is clearly guilty of attempting to pack the jury.

When the peremptory challenges are exhausted or waived the jury must be sworn.

No. 498.

Form of Oath to the Jury.

You, and each of you, do solemnly swear that you will well and truly try the matter at issue between A. B., plaintiff, and C. D., defendant, and a true verdict render according to the evidence, so help you God.

The plaintiff may then briefly state his claim and the evidence by which he expects to sustain it.

The defendant may then briefly state his defense, and may briefly state the evidence he expects to offer in support of it.

The party who would be defeated if no evidence were to be given on either side must first produce his evidence; the adverse party will then produce his. The rule adopted by the supreme court of Ohio is this: If *no* evidence is required of the plaintiff the defendant should open and close; but if any evidence, no matter how slight, is required of the plaintiff, he has the right to open and close. *Lexington Ins. Co. v. Paren*, 16 O., 330. The code does not seem to have changed this rule.

No. 499.

Form of Oath to Witnesses.

You, and each of you, do solemnly swear that the testimony you shall give to the court and jury in the case now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth, so help you God.

No. 500.

Affirmation.

You, and each of you, do solemnly affirm that the testimony you shall give to the court and jury in the case now on trial, wherein A. B. is plaintiff and C. D. defendant, shall be the truth, the whole truth, and nothing but the truth, and this you do under the pains and penalties of perjury.

No. 501.

Oath of Interpreter.

You do solemnly swear that you will faithfully and correctly interpret between the court and attorneys and the witnesses in the case now on trial, wherein A. B. is plaintiff and C. D. defendant, so help you God.

Separation of witnesses. The court may, if it considers it necessary, on motion of either party, order that the witnesses shall be examined out of the hearing of each other. When such an order is made the court will direct the sheriff to furnish them a separate room until they are called for. An order of this kind should not, as a general rule, include experts, or attorneys who have business in court.

Examination of witnesses. The party introducing the witness examines him first, which is called the direct examination. Upon the conclusion of the direct examination he may be examined by the adverse party, which is called the cross-examination. He may then be re-examined by the party calling him. The party may, however, after the examination of his other witnesses, re-call any witness who has testified. In the direct examination of a witness it is not allowed to put to him what are termed leading questions, that is, questions which suggest to the witness the answer desired. 1 Greenleaf Ev., sec. 434. But this rule does not apply to that part of the examination which is merely introductory to that which is material. And when a witness is called who appears to be hostile to the party producing him, or in the interest of the other party, or unwilling to give evidence, or where there is an omission in his testimony caused by a want of recollection, leading questions are permitted. Id., sec. 435.

The questioner should not assume facts to have been proved which have not been proved, nor that particulars have been given which have not been given.

Leading questions are proper on cross-examination.

The evidence must be confined to the matter at issue between the parties. But any testimony which has a reasonable tendency to elucidate the matter in controversy is pertinent and proper. The matters in issue may be proved not only by direct testimony but by proof of circumstances from which such facts may be reasonably inferred. This is called circumstantial or presump-

tive evidence. 1 Greenleaf Ev., secs. 51-5. *Horbach v. Miller*, 4 Neb., 44. The presumption, however, must rest on facts [circumstances] proved. *Horbach v. Miller*, 4 Neb., 44.

If objection is made to the introduction of testimony the reason should be given. *Morgan v. Larsh*, 1 Neb., 363. *Tecumseh Town Site Case*, 3, Id., 276. Otherwise if the testimony is admissible for any purpose it will not be erroneous to admit it.

An attorney should endeavor to prevent the introduction of improper testimony, and if it is admitted should preserve the rights of his client by the proper exceptions. And at times he may be in doubt as to the propriety of a question asked a witness, and as a precaution should save his client's rights by excepting; but the practice occasionally indulged in of persistently objecting to pertinent and proper testimony is not to be commended. Testimony offered and excluded must be preserved in a bill of exceptions, otherwise a reviewing court cannot determine whether or not the court erred in excluding it.

After the evidence in chief is offered the parties will then be confined to rebutting testimony, unless the court for good reasons, in furtherance of justice, permits them to offer evidence in their original case.

It is not an abuse of discretion for the court to permit the parties, in furtherance of justice, to offer additional evidence in support of the cause of action or defense after a case has been submitted to the jury. *Tomer v. Densmore*, 8 Neb., 784. In such case the court may admit it, and when it is in furtherance of justice should do so.

Impeachment of witnesses. In addition to showing, on cross examination, the improbability of the truth of the testimony given by a witness, he may be impeached—*First*, by disproving the facts stated by him by the testimony of other witnesses. *Second*, by general evidence affecting his credit for veracity. 1 Greenleaf Ev., § 461.

The examination in impeaching the credit of a witness must be confined to his general reputation, and will not be permitted as to particular facts. *Matthewson v. Burr*, 6 Neb., 312.

The inquiry must be made as to the general reputation of the witness in the community in which he resides, or with whom he

is chiefly conversant. Ordinarily the witness ought himself to come from the neighborhood of the person whose character is in question.

If the witness answer that he is not acquainted with the general reputation of the witness sought to be impeached no further inquiry can be made of him on that point.

If he answer in the affirmative he may be asked the further questions: "Is his reputation for truth good or bad?" "From your knowledge of his general reputation would you believe him under oath?" The adverse party may cross-examine the impeaching witness as to his means of knowledge, and the grounds upon which he bases his opinion, and may call witnesses to support the character of his own witness.

Where witnesses testify that they are well acquainted with the general reputation of the person sought to be impeached in the community in which he resides, and have never heard his reputation for truth called in question, this is evidence that his reputation is good. *State v. Lee*, 22 Minn., 407. *Matthewson v. Burr*, 6 Neb., 312. *Fisk v. The State*, 9 Id., 62.

Conflicting statements. To discredit a witness by showing that he has made statements out of court in conflict with his testimony it is necessary generally to ask him as to the *time*, *place*, and *person* involved in the supposed contradiction. Otherwise he may not remember whether he has so said or not. 1 Greenleaf Ev., § 462.

A party cannot impeach a witness called by himself by evidence of his reputation, but he may prove the truth of a particular fact by other competent testimony in contradiction of what such witness may have testified to. 1 Greenleaf Ev., §§ 442-3.

Withdrawing a Juror. Where a party has been taken by surprise by the testimony offered by the adverse party, or by the exclusion of testimony offered by himself, and on that account will fail in his action or defense, the court, if satisfied of that fact, may permit him to withdraw a juror, upon the payment of the costs of the term, and have the cause continued to the next term. The right is a valuable one, and is intended to prevent injustice, but the court should not permit it to be exercised as a mere pretext for a continuance.

When the evidence is concluded either party may request instructions to the jury on points of law, which shall be given or refused by the court.

Section 3 of the act in relation to instructions, approved February 25, 1875, provides that "the court must read over all the instructions which it intends to give, and none other, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury all those which are refused, and must write the words 'given' or 'refused,' as the case may be, on the margin of each instruction."

Section 3 provides that "if the giving or refusing be excepted to the same may be without any reason stated therefor, and all instructions demanded, as well as all instructions given to the jury by the court on its own motion, must be plainly and legibly written in consecutively numbered paragraphs, and filed with the clerk before being read to the jury by the court; and such instructions shall be preserved as a part of the record of the cause in which they were given."

While the parties have the right to request instructions before the argument, so far as I have observed, they are but seldom asked for or given until its conclusion.

The argument. The parties may then submit or argue the case before the jury. In the argument the party required first to produce his evidence has the opening and closing. If several defendants having *separate* defenses appear by different counsel, the court shall arrange their relative order. This applies only to cases where the several defendants have *separate* and *distinct* defenses, and not to cases where they all rely on the same ground of defense.

In the argument of the case the attorneys should confine themselves to a legitimate discussion of the case made by the evidence. And it is the duty of the court to see that this is done. Statements of fact made outside of the evidence, if properly excepted to, may require a reversal of the case. *Roose v. Perkins*, 9 Neb., 305. *Cropsey v. Averill*, 8 Id., 160.

Instructions. The court—not the jury—has the exclusive power to determine what the issues made by the pleadings are.

The first duty of the court in giving instructions, therefore, is to

state clearly and explicitly to the jury what the issues are—what question or questions are in dispute between the parties. Unless the jury fully understand the issue—the exact question or questions in dispute—a satisfactory verdict cannot be expected.

The court, on its own motion, should prepare and give such instructions as it considers necessary to enable the jury to comprehend the law relating to that particular case. Ordinarily they should be as brief as possible, clearly stating the very principles which apply and upon which the case should be decided. Very lengthy instructions tend to confuse and mislead the jury, and ordinarily should be avoided.

If either party request additional instructions they should be filed with the clerk. Instructions which have already been given in the charge of the court need not be repeated. Instructions upon abstract propositions of law, correct in themselves, but having no bearing upon the questions involved in the case, should be refused.

The court should prepare its instructions so that each paragraph thereof shall raise a distinct question of law, so that if any paragraph is unsatisfactory to either party an exception may be taken to the same. In certain cases, where there is a failure to prove a material fact upon which the cause of action or defense depends, the court may instruct the jury for whom they should find. But where there is testimony tending to prove a cause of action or defense the case must be submitted to the jury. *Dolby v. Tingley*, 9 Neb., 412.

Except in cases where it is proper for the court to direct a verdict the utmost care should be taken to avoid expressing an opinion on the facts.

Excepting to instructions. The court should, as far as possible save the rights of the parties by preserving their exceptions. But usually it is unadvisable to enter into a discussion of the question of giving or refusing instructions in the presence of the jury, nor should an instruction which is refused be read or its contents stated in their presence.

Whenever in the opinion of the court it is proper for the jury to have a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may or-

der them to be conducted in a body, under the charge of an officer, to the place, which shall be shown them by some person appointed by the court for that purpose.

The jury may be discharged for the causes set forth in section 288 of the code, and the case tried again immediately or at a future time.

When the case is finally submitted to the jury they may decide in court or retire for deliberation. If they retire they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court, subject to the discretion of the court to permit them to separate at night, and at their meals. While the jury are deliberating on their verdict the better course is not to permit them to separate.

The officer should *not* remain in the jury room with the jury while they are deliberating on their verdict, and he should in no way attempt to influence them in making up their verdict. If he does he may be punished for contempt.

After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them into court, where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute, in *presence of* or *after notice* to the *parties* or their *counsel*.

The jury must follow the instructions given them by the court. Whether they are correct or not, the jury must regard them as correct and find accordingly. If the instructions are incorrect the party injured can have them reviewed on error.

The jury must choose a foreman, and their verdict when agreed upon must be reduced to writing and signed by him. It is their duty to find according to the evidence and the law as given them by the court.

No juror has a right to state to the jury facts within his own knowledge in relation to the case, nor to advance opinions of his own in conflict with the testimony given on the trial, and the instructions of the court.

When a verdict is agreed upon the jury are to be conducted into open court, their names called by the clerk, and if all are present the verdict is to be read by the clerk to the jury, and they must be asked if it is their verdict. If there is no disagreement expressed, and neither party requires the jury to be polled, the verdict is complete and the jury may be discharged from the case; but if any juror disagrees the jury must be sent out again.

Polling the jury. In polling the jury it is usual for the court to inform the jury that their names will be called by the clerk, and each juror giving his assent to the verdict returned by the foreman will, when his name is called, answer "Yes," and those not giving such assent will answer "No."

Sealed verdict. When, as is usual where a jury are sent out at night, they are permitted to seal their verdict and separate before it is rendered, such sealed verdict has no force or effect unless affirmed in open court. *Young v. Seymour*, 4 Neb., 86. 3 Blackstone Com., 377.

The verdict may be either general or special. A general verdict is that by which the jury pronounce, generally, upon all or any of the issues, either in favor of the plaintiff or defendant.

A special verdict is that by which the jury find the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law.

When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.

When by the verdict either party is entitled to recover money of the adverse party, the jury in their verdict *must assess the amount of recovery.*

NO. 502.

Verdict for Plaintiff on a General Denial.

A. B. }
 v. }
 C. D. }

We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess the amount of his recovery at the sum of \$.....

E. F., *Foreman.*

No. 503

Verdict for Defendant.

We, the jury duly impaneled and sworn in the above entitled cause, do find for the defendant. E. F., *Foreman*.

No. 504.

In an Action for Damages.

We, the jury duly impaneled and sworn in the above entitled cause, do find for the plaintiff and assess his damages at the sum of \$..... E. F., *Foreman*.

No. 505.

In Cases of Set-off.

We, the jury duly impaneled and sworn in the above entitled cause, do find that there is due from the defendant to the plaintiff, upon the causes of action set forth in his petition, the sum of \$.....; and we further find that there is due from the plaintiff to the defendant, upon his set-off, the sum of \$.....; we therefore find that there is due from the defendant to the plaintiff a balance amounting to the sum of \$....., which we assess to the plaintiff as the amount of his recovery.

E. F., *Foreman*.

No. 506.

Verdict upon a Breach of Warranty.

We, the jury duly impaneled and sworn in the above entitled cause, do find that the plaintiff did warrant said [horse] as sound, as alleged by the defendant in his answer, and that said [horse] was not sound at the time said warranty and sale were made, and that the defendant has sustained damages by reason thereof in the sum of \$....., which being deducted from \$....., the price of said [horse], we find there is due from the defendant to the plaintiff the sum of \$....., which we assess to the plaintiff as the amount of his recovery.

E. F., *Foreman*.

No. 507.

Special Verdict.

A. B. }
v. }
C. D. }

The jury are directed to answer in writing each of the following questions:

1. Was E. F. a member of the firm of A. B. and Co. on the first day of July, 18...?

Answer. No.

2. If not a member of said firm at the date aforesaid, did he by his conduct hold himself out to the public and to the plaintiff as a partner thereof, and thereby induce the plaintiff to believe that he was a member of said firm?

Answer. Yes.

E. F., *Foreman.*

TRIAL BY THE COURT.

The trial by jury may be waived by the parties in actions arising on contract, and with the assent of the court in other actions in the following manner:

First. By the consent of the party appearing when the other party fails to appear at the trial by himself or attorney.

Second. By written consent in person, or by attorney, filed with the clerk.

Third. By oral consent in open court entered on the journal.

Upon the trial of questions of fact by the court it is not necessary for the court to state its findings except generally for the plaintiff or defendant, unless one of the parties request it with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law.

Where a jury is waived the finding of the court is equally as conclusive as the verdict of a jury.

Special findings are like special verdicts, and should be entered on the record in the same manner.

No. 508.

Separate Finding of Facts and Law.

A. B., }
v. }
C. D. }

This cause came on to be heard, and the parties in open court having waived a jury, it was submitted to the court upon the pleadings and evidence, and the court, on the request of the [defendant], being required to state its conclusions of fact sep-

arately from its conclusions of law, and being fully advised in the premises, finds as follows :

1. That on the day of, 18..., the defendant C. D. was a member of the firm of E. F. & Co.

2. That said firm was engaged in the hardware trade and on said day the defendant purchased from the plaintiff for the use of said firm [*one thousand kegs of nails*] at \$..... per keg, payable in thirty days from delivery.

3. That said nails were delivered to and accepted by said firm on the day of, 18...

4. No part thereof has been paid.

Conclusions of law :

That said C. D. is liable as a member of said firm for said debt and that said firm is indebted to the plaintiff for said nails in the sum of \$.....

It is therefore considered by the court that the plaintiff have and recover from the defendants the sum of \$..... so as aforesaid found due, and his costs herein expended taxed at \$.....

CHAPTER XXIII.

NEW TRIALS.

A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision by the court.

New trials will be granted for any of the following causes :

First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.

If the party complaining has not been prejudiced by the irregularities complained of a new trial ought not to be granted. *Karney v. Paisley*, 13 Iowa, 89.

Second. Misconduct of the jury or prevailing party. A new

trial should be granted, as of course for misconduct of the jury or prevailing party. Any attempt by the prevailing party to influence a juror is good cause for setting the verdict aside. The affidavits of jurors may be received to impeach the conduct of third parties, but not to show their own misconduct. Under the code of Iowa affidavits of jurors may be received to show on what grounds the verdict was rendered. But such affidavits cannot be received in this state.

Third. Accident or surprise, which ordinary prudence could not have guarded against.

The word "accident" in practice is construed as meaning "such an unforeseen event, misfortune, loss, act, or omission, as is not the result of any negligence or misconduct in the party." 1 Bouvier Law Dict. (14th ed.), 52. Story's Eq. Jur., § 78.

By "surprise" is to be understood "the situation in which a party is placed, without any default of his own, which will be injurious to his interests." 2 Id., page 573. A new trial should not be granted on this ground to relieve a party from the effect of his own neglect, or because he has mistaken the law. New trials have been granted because of a material witness absenting himself, or being taken suddenly ill after the trial commenced, but it is doubtful whether such grounds would be sufficient under our present practice. The party should ask leave to withdraw a juror, and have the case continued. He should not be permitted to proceed with the trial and take the chances of a verdict in his favor, and being defeated assign his own want of prudence as cause for a new trial.

Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice. This provision seems to have been intended to apply to actions *ex delicto*.

Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property.

Sixth. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law.

Seventh. Newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.

Eighth. Errors of law occurring at the trial, and excepted to by the party making the application.

The application for a new trial must be made at the term the verdict, report, or decision is rendered, and, except for the cause of newly-discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be made within three days after the verdict or decision was rendered unless unavoidably prevented. See *Fox v. Meacham*, 6 Neb., 533. *Nesbit v. Hines*, 17 Kan., 316.

The application must be by motion upon written grounds filed at the time of making the motion. The cases enumerated in subdivisions *two, three, and seven*, must be sustained by affidavits showing their truth, and may be controverted by affidavits.

Motion unnecessary, when. When a demurrer is sustained to a petition and the action dismissed no motion for a new trial is necessary to have the judgment reviewed; and the same rule applies to an order confirming or setting aside a sale of real estate, and *probably* to a judgment rendered on the pleadings. The reason is the issue presented upon the question of the sufficiency of pleadings or proceedings is one of law.

A motion must be filed in all cases where there has been a trial of an issue of fact, whether before a jury, referee, or judge. An action at law can be reviewed only on error; and all the errors deemed prejudicial to the moving party committed during the progress of a trial must be assigned in the motion for a new trial, otherwise they are waived.

As the motion must necessarily be prepared somewhat hastily, often while other engagements are pressing, and therefore not sufficient time to examine the various grounds for a new trial critically, the better course is to assign all the grounds that are *believed* to exist,¹ but no ground should be assigned therein unless justified by the proceedings.

¹ While judge of the district court I frequently suggested to young attorneys the propriety of assigning as many grounds in their motion for a new trial as the proceedings in the case would justify. The reason being that errors not assigned in the motion are waived. On the argument of the motion, however, the party should rely only on such errors as are prejudicial to him.

No. 509.

Motion for New Trial.

In the District Court of.....County:

William Wentworth, plaintiff, }
 against
Henry Mathewson, defendant. }

The defendant moves the court for a new trial of this cause for the following reasons:

1. There was irregularity in the proceedings in this [*state specifically the irregularity complained of*].

2. The misconduct of the jury and plaintiff in this [*that while the jury were considering their verdict the plaintiff, without leave of court, sent a lunch to them, which they received through a window from the sidewalk*].

3. For accident [*or surprise*] in this [*state the facts showing accident or surprise*].

4. The damages are excessive, appearing to have been given under the influence of passion or prejudice.

5. There is error in the assessment of the amount of recovery in this [*the action is brought to recover the sum of \$....., with interest at ... per cent from the day of, 18..., which could not exceed in the aggregate the sum of \$....., whereas the verdict is for \$.....*].

6. The verdict is not sustained by sufficient evidence.

7. The verdict is contrary to law.

8. The verdict is contrary to the second and third paragraphs of the instructions given by the court on its own motion.

9. Newly discovered evidence material to the defendant, as shown by the affidavits of E. F., G. H., and I. J., submitted herewith, which evidence the defendant was unable, with reasonable diligence, as shown by his own affidavit herewith submitted, to discover and produce on the trial.

10. The court erred in excluding the bill of sale marked Ex. E., executed and delivered by the plaintiff to the defendant on the day of, 18..., for the property, which is the subject of the action [*point out in some way specifically the testimony offered and excluded or improperly admitted*].

11. The court erred in refusing to give the second and third instructions asked by the defendant.

12. The court erred in giving the *second* paragraph of the instructions asked by the plaintiff.

S. J., *Attorney for defendant.*

No. 510.

Affidavit on Ground of Misconduct of Party and Jury.

[Title of Cause.]

[Venue.]

C. D., being first duly sworn, deposes and says that on the day of, 18..., and while the jury in the above entitled cause were deliberating on their verdict, he saw A. B., the plaintiff in said action, pass a basket through a window to the jury in the jury room, the bailiff in charge thereof not being near.

C. D.

Subscribed, etc.

No. 511.

Affidavit on Ground of Accident or Surprise.

C. D., defendant in the above entitled cause, being first duly sworn, deposes and says that this action was brought for the conversion of goods, the answer denying the facts stated in the petition, and alleging that the plaintiff was not the owner of the goods in controversy, that on the trial of the cause the plaintiff failed to prove the value of the goods, and because of such failure, as he could not recover, it was unnecessary for the defendant to introduce testimony tending to show that he was not the owner thereof, which otherwise the defendant would have done; that after the cause was submitted to the jury the plaintiff, by leave of the court, introduced testimony showing the value of said goods, the court restricting the proof on the part of the defendant to testimony as to the value thereof, and refused to permit defendant to introduce testimony showing that the plaintiff was not the owner of said goods, by reason of which the defendant was taken by surprise and prevented from offering testimony pertinent to the issue and material to his defense.¹

C. D.

Subscribed, etc.

No. 512.

Affidavit on the Ground of Newly Discovered Evidence.

C. D., defendant in the above entitled cause, being first duly sworn, deposes and says that this action was brought in replevin

¹ See *Tomer v. Densmore*, 8 Neb., 384.

to recover the possession of certain chattels taken under an order of attachment in an action wherein the defendant herein was plaintiff and defendant, the plaintiff herein claiming to be the owner thereof; that since the trial of this cause, to-wit: on the day of, 18..., he had a conversation with one G. H., who informed him that after the levy of said attachment, and about the time this action was commenced, he was present when the plaintiff and [*the judgment debtor*] made an agreement whereby the plaintiff was to take the goods in question and defeat the attachment, and that the plaintiff admitted to him that he was not the owner of said goods. The defendant was not aware at the time of the trial of said cause that said conversation had taken place or that said G. H. had any knowledge whatever in relation to the ownership of said goods; that this evidence is new, material to the case, and is not cumulative.

C. D.

Subscribed, etc.

No. 513.

Corroborating Affidavit of G. H.

G. H., being first duly sworn, deposes and says that after certain goods had been taken on an order of attachment in an action pending in the court, wherein the defendant herein was plaintiff and defendant, and about the time this action was instituted, the affiant was present at an interview between the plaintiff herein and [*judgment debtor*], wherein it was agreed between them that the plaintiff was to take said goods by replevin and defeat the attachment, and the plaintiff about that time admitted to affiant that he was not the owner thereof, but said he did not like to see [*the judgment debtor*] broken up in business. That I never mentioned this conversation to any one until after the rendition of the judgment in this case, when, seeing that injustice had been done, I informed the defendant of these facts.

G. H.

Subscribed, etc.

In case of newly discovered evidence the affidavit of the witness should also be produced, and it must appear that the evidence is new and not cumulative.

No. 514.

Order Granting New Trial.

[Title of the Cause.]

This cause came on to be heard on the motion of the defendant to set aside the verdict, [*report of referee, or judgment of the court,*] on consideration whereof the court doth sustain the same, and said verdict, [*report of referee, or judgment of the court,*] is set aside and vacated and a new trial granted [*at the costs of the defendant*].

No. 515.

Order Overruling Motion.

This cause came on to be heard on the motion of the defendant to set aside the verdict and for a new trial, on consideration whereof the court does overrule the same.

No. 516.

In case of Remittitur of Excess.

This cause came on to be heard on the motion of the defendant to set aside the verdict and for a new trial; and it appearing to the court that the plaintiff should not recover to exceed the sum of \$....., and that the damages are excessive, and the plaintiff having in open court remitted the sum of \$!..... from said verdict, the court doth overrule the motion for a new trial.

No. 517.

New Trial Denied upon Condition that Remittitur be Entered.

This cause came on to be heard on the motion of the defendant to set aside the verdict and for a new trial; and it appearing to the court that the plaintiff should not recover to exceed the sum of \$!....., and that the damages are excessive, it is therefore ordered by the court that said motion be sustained and a new trial granted, unless the plaintiff within days remit from the verdict the sum of \$!..... If said remittitur is made as above provided the motion to be overruled.¹

The question of costs, as a condition of granting a new trial, seems to rest to a great extent in the discretion of the court granting the new trial.

No. 518.

Petition for a New Trial.

[Title of the Cause.]

1. The plaintiff complains of the defendant for that on the day of, 18..., said defendant commenced an action

¹ See *Patrick v. Leach*, 8 Neb., 530.

in the district court of county against one E. F., and the plaintiff herein to recover the sum of \$....., with interest, upon a promissory note made by said E. F. and signed by the plaintiff as surety.

2. The plaintiff herein answered the petition of the defendant herein in said case, alleging that after said note had become due and payable the defendant herein agreed with said E. F., in consideration of the sum of \$....., to extend and did extend the time of payment of said note for one year from the day of, 18..., without the consent of the plaintiff herein.

3. The defendant herein, plaintiff in said action, in his reply denied the facts stated in said answer.

4. In the year 18... said E. F. having become insolvent, removed to California, but his place of residence was not known to plaintiff, who made inquiry as to his whereabouts of the friends of said E. F. and others, and addressed letters to various parties in California who were supposed to know where he could be found, but was unable to find him, and had said cause continued over one term of court, at the costs of the plaintiff herein, upon the ground that said E. F. was a material witness for the plaintiff herein in said cause.

5. At the term of said court the defendant herein recovered a judgment against the plaintiff on said note for the sum of \$..... and costs, the plaintiff herein having been unable to find said E. F. or any witness by which he was able to prove that said time for the payment of said note had been extended.

6. On or about the day of, 18..., the plaintiff was informed that said E. F. was at Yuma City, Arizona Territory, and he immediately addressed a letter to him at that place making inquiries as to the extension for a consideration by the defendant herein of the time for the payment of said note, and on the day of, 18..., received a letter from said E. F. stating that said defendant, in consideration of the sum of \$..... then paid, did extend the time for the payment of said note for the period of one year from the time the same became due, and that the defendant herein requested said E. F. not to inform the plaintiff of the extension of said time, and he is ready to testify to these facts when required.

7. Said E. F. is entirely insolvent, and the plaintiff herein will lose the amount of said judgment unless a new trial is granted.

The plaintiff herein therefore prays that said judgment may be set aside and a new trial granted in said cause.

No answer is required. The defendant may demur to the petition. If the demurrer is overruled the plaintiff must prove the facts stated in his petition.

No. 519.

Judgment Set Aside on Petition for a New Trial.

[Title of Cause.]

This cause came on to be heard upon the petition of the plaintiff and the evidence, on consideration whereof the court finds* that since the trial of the cause set forth in said petition the plaintiff herein, who was one of the defendants in cause No. ... in this court, has discovered new and material evidence for him on the issue tried in said cause, which he could not with reasonable diligence discover to use on the former trial, and that by reason of the facts above set forth he is entitled to have said judgment vacated.

It is therefore considered that the judgment heretofore rendered in cause No. ..., wherein is plaintiff and, are defendants, be and hereby is set aside and vacated, and a new trial granted in said cause at the costs of the plaintiff herein of the former trial, and it is ordered that said cause be placed on the trial docket for trial in its order.

No. 520.

New Trial Denied.

Follow the preceding form to the *, then add that the plaintiff is not entitled to a new trial, as prayed for in said petition.

It is therefore considered that the defendant herein go hence without day, and recover from the plaintiff his costs herein expended taxed at \$.....

The remedy provided in the statute is not exclusive. A court of equity in a proper case will grant relief. To entitle a party to relief in such case it must appear that he has done all that he could under the circumstances, that he has not been negligent, and that he has a defense to the action. *Horn v. Queen*, 4 Neb., 114. *Lieby v. Heirs of Ludlow*, 4 Ohio, 493.

CHAPTER XXIV.

JUDGMENTS.

A *judgment* is the final determination of the rights of the parties in an action. Code, § 428.

Section 429. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on either side as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on the other defendants, or to proceed in the cause against the defendant or defendants served.

Section 430. An action may be dismissed without prejudice to a future action.

First. By the plaintiff before the final submission of the case to the jury or to the court, where the trial is by the court.

Second. By the court, where the plaintiff fails to appear on the trial.

Third. By the court for want of necessary parties.

Fourth. By the court, on the application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.

Fifth. By the court for disobedience by the plaintiff of an order concerning the proceedings in the action.

In all other cases, upon the trial of the action, the decision must be upon the merits.

Section 431. In any case where a set-off or counterclaim has been presented the defendant shall have the right of proceeding

to the trial of his claim, although the plaintiff may have dismissed the action or failed to appear.

Section 432. If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue at law, the court may, *with the assent of the party not in default*, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee, or commissioner, or may direct the same to be ascertained or assessed by a jury. If a jury be ordered it shall be *on or after* the day on which the action is set for trial.

Judgment by confession. Section 433. Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, *with the assent of the creditor*,¹ or person having such cause of action, confess judgment therefor, whereupon judgment shall be entered accordingly.

Section 434. The debt or cause of action shall be briefly stated in the judgment, or in a writing, to be filed as pleading in other actions.

When any judgment or decree shall be rendered for a conveyance, release, or acquittance in any court of this state, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time mentioned in said judgment or decree, such judgment or decree shall have the same operation and effect, and be as available as if the conveyance, release, or acquittance had been executed conformable to such judgment or decree. Laws of 1869, page 70. G. S., 711.

There is but little to be added to these sections. If we construe these sections as we do ordinary language no difficulty will be experienced in construing them.

The judgment must follow the pleadings and respond to the issues.

No judgment by default can be entered while an answer is on file, however informal it may be, the proper remedy to

¹ See *Mercer v. James*, 6 Neb., 406.

the plaintiff in such case being to strike the answer from the files.

Where there is no appearance before judgment by default is entered against the defendant the court should examine the record to see that the proper service has been had to give the court jurisdiction.

The general principle regulating the conclusiveness of judgments may be stated thus: They must be *final* and on the *merits*. As to the form of judgment Blackstone says:

“The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of *the law*. It is the conclusion that naturally and regularly follows from the premises of law and fact. * * * The judgment, in short, is the remedy prescribed by law for the redress of injuries, and the suit or action is the vehicle or means of administering it.”

“What that remedy may be is indeed the result of deliberation and study to point out, and therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own; but, ‘it is considered’ *consideratum est percuriam* that the plaintiff do recover his damages, his debt, his possession, and the like; which implies that the judgment is none of their own; but the act of law, pronounced and declared by the court after due deliberation and inquiry.” 3 Blackstone Com., 396.

Under our practice no notice of the case for trial is necessary. When a case is at issue it is for trial in its order, unless continued by consent or on an order of the court on the application of one of the parties.

FORMS.

No. 521.

Judgment by Default for a Fixed Sum.

A. B., plaintiff, }
v.
C. D., defendant. }

Now comes the plaintiff, and the defendant having failed to answer or demur to the petition of the plaintiff, the court finds

that the defendant thereby admits the facts stated in the petition to be true,* and that there is due from the defendant to the plaintiff on the causes of action set forth in said petition the sum of \$....., together with the sum of \$..... as interest thereon.

It is therefore considered by the court that the plaintiff recover from the defendant the sum of \$..... [*aggregate*], and his costs expended herein, taxed at \$.....

No. 522.

Default where Damages are Unliquidated.

Follow the preceding form to the*, then say: and that the plaintiff is entitled to recover from the defendant the damages sustained by him in the premises, and the court, with the assent of the plaintiff, does assess said damages of the plaintiff at the sum of \$.....

It is therefore considered, etc. [*as in preceding form*].

No. 523.

Judgment where the Answer does not Put in Issue the Entire Cause of Action.

This cause came on to be heard on the petition, answer, and the evidence, on consideration whereof the court finds that the defendant has failed to answer the *third* cause of action set forth in said petition, and as to that is in default, and that he is indebted to the plaintiff on said cause of action in the sum of \$.....

It is therefore considered, etc.

No. 524.

By Default against One Defendant, Trial being had as to Another.

This cause came on to be heard on the petition, the answer of E. F., and the evidence, the defendant G. H. having failed to answer or demur to the petition, and a jury being waived, the cause was submitted to the court, on consideration whereof the court finds that the defendant G. H. by his default admits the facts stated in the petition to be true, and on the issue joined between the plaintiff and the defendant E. F., the court finds for the plaintiff, and that said defendants are indebted to him in the sum of \$.....

It is therefore considered, etc.

No. 525.

Against One Defendant and in Favor of Another.

This cause came on to be heard on the petition, the several answers of the defendants, and the reply of the plaintiff thereto, and the evidence, on consideration whereof the court finds that the defendant E. F. is indebted to the plaintiff on the cause of action set forth in said petition in the sum of \$....., and as to the defendant G. H. the court finds that he is not indebted to the plaintiff on the cause of action set forth in said petition.

It is therefore considered by the court that the plaintiff recover from the defendant E. F. the sum of \$....., and his costs herein expended taxed at \$....., and that said cause be dismissed as to the defendant G. H., and that he go hence without day and recover from the plaintiff his costs herein expended taxed at \$.....

No. 526.

Judgment of Dismissal for Want of Prosecution.

Now on this day this cause was called for trial, and the plaintiff or his attorney failing to appear, on motion of the defendant it is ordered that this action be and the same hereby is dismissed without prejudice, and that the defendant recover his costs.

No. 527.

Dismissal by Plaintiff.

Now on this day the plaintiff dismissed this action without prejudice.

No. 528.

Want of Jurisdiction.

It satisfactorily appearing to the court that it has no jurisdiction of the subject matter of the action, on motion of the defendant said cause is stricken from the docket.

No. 529.

For Failure to Give Security for Costs.

The plaintiff having failed to comply with the order of the court heretofore made and give security [or additional security] for costs, on motion of the defendant the action is dismissed, at plaintiff's costs.

No. 530.

Judgment for Defendant.

This cause came on to be heard on the petition, answer of the defendant, and the evidence, and a jury being waived, was submitted to the court, on consideration whereof the court finds upon the issue joined between the parties in favor of the defendant.

It is therefore considered by the court that said action be dismissed, and that the defendant go hence without day and recover from the plaintiff his costs herein expended taxed at \$.....

No. 531.

Against One of Several Plaintiffs.

This cause came on to be heard on the petition, the answer of the defendant, and the evidence, and a jury being waived was submitted to the court, on consideration whereof the court finds upon the issue joined between the parties against the plaintiff E. F.

It is therefore considered by the court that the petition as to the plaintiff E. F. be dismissed, and that the defendant recover from him his costs herein expended taxed at \$.....

No. 532.

Judgment on Verdict.

Now on this day of, 18..., came the parties and their attorneys, and also the following named persons, as jurors, to-wit: [*insert the names of the twelve jurors*], who were duly impaneled and sworn according to law, and having heard the testimony, the argument of counsel, and the instructions of the court, retired in charge of the [*sheriff*] for deliberation, and on the same day returned into open court the following verdict in writing, duly signed:

[*Copy verdict.**]

It is therefore considered by the court that the [*plaintiff*] recover from the defendant the sum of \$..... and the costs of this action taxed at \$.....

No. 533.

*Judgment Non-obstante Verdicto.*¹

Follow the preceding form to the*, then say—

The plaintiff thereupon moved for judgment on the pleadings notwithstanding the verdict, and as in the opinion of the court the answer leaves the cause of action unanswered and confessed,

It is therefore considered that the plaintiff recover from the defendant his damages claimed in said petition, and it is hereby ordered that a jury be impaneled to assess the same.

No. 534.

Judgment by Confession.

Now comes the plaintiff, and the defendant in person, and says that he is justly indebted to said plaintiff in the sum of \$..... upon a promissory note, of which the following is a copy:

“BLAIR, May 1, 1876.

“One year after date for value received I promise to pay A. B. or order the sum of \$....., with interest at 10 per cent.

“C. D.”

And with the consent of the plaintiff² confesses the same in open court and asks to have judgment rendered against him thereon, for said sum of \$.....

It is therefore considered, etc.

No. 535.

Confession on a Warrant of Attorney.

Now comes the plaintiff, by S. H., his attorney, and files his petition against the defendant, and thereupon T. K., one of the attorneys of this court, appeared on behalf of the defendant, and by virtue of a warrant of attorney, duly executed by the defendant and now produced to the court, waived the issuing and service of summons, and with the assent of the plaintiff

¹ Where a plea or replication is good in form only, but bad in substance, and constitutes neither a bar or answer, and issue is taken on it, and the verdict finds it true, such verdict leaves the cause of action or bar unanswered and confessed, and judgment *non-obstante* should be entered for him whose cause of action or bar is confessed. *Oades v. Oades*, 6 Neb., 304.

² See *Mercer v. James*, 6 Neb., 406.

confessed that the defendant is indebted to the plaintiff in the sum of \$..... upon the cause of action set forth in said petition.

It is therefore considered by the court, etc.

No. 536.

Judgment for Plaintiff for Balance after Admitting Counter-claim.

This cause came on to be heard upon the petition of the plaintiff, the answer of the defendant and the evidence, and was submitted to the court, on consideration whereof the court finds that the defendant by his answer has failed to deny the facts stated in the petition of the plaintiff, but admits the same, and having set up a counter-claim against him for the sum of \$....., which the plaintiff admits to be correct,

It is therefore considered by the court that the plaintiff recover from the defendant the sum of \$....., the excess of the claim set forth in his petition over the counterclaim of the defendant, and that the plaintiff recover his costs.

No. 537.

Judgment for Defendant on Petition and Counter-claim.

This cause came on to be heard on the petition, counter-claim, reply, and the evidence, and a jury being waived was submitted to the court, on consideration whereof the court finds there is due from the defendant to the plaintiff, on the cause of action set forth in the petition, the sum of \$....., and that there is due from the plaintiff to the defendant upon his counter-claim the sum of \$.....

It is therefore considered by the court that the defendant recover from the plaintiff the sum of \$....., the excess of his counter-claim over the sum due the plaintiff, and his costs herein expended taxed at \$.....

No. 538.

For Defendant on Counter-claim After the Dismissal of the Petition.

The plaintiff, having dismissed his petition, this cause came on to be heard upon the counter-claim [*or set-off*] of the defendant and the evidence, and a jury being waived was submitted to the court, on consideration whereof the court finds the issues in favor of the defendant, and that the plaintiff is indebted to him in the sum of \$.....

It is therefore considered, etc.

No. 539.

Decree of Foreclosure and Order of Sale.

This cause came on to be heard upon the petition, the answer of the defendants C. D. and E. A. D., the reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that the defendants, C. D. and E. A. D., his wife, executed and delivered to the plaintiff the mortgage deed, set forth in said petition, upon the following described real estate, to-wit: [*describe as in mortgage*], and that said mortgage was duly recorded on the day of, 18..., in the record of mortgages of county.

The court also finds that there is due to the plaintiff upon the notes set forth in said petition, which said mortgage was given to secure, the sum of \$....., and that the plaintiff is entitled to a foreclosure of said mortgage as prayed.

It is therefore considered by the court that in case the defendants fail for twenty days from the entry of this decree to pay to the plaintiff the sum of \$....., the defendants' equity of redemption be foreclosed and said mortgaged premises shall be sold and an order of sale shall be issued to [*the sheriff*] of county, commanding him to sell the above described real estate as upon execution, and bring the proceeds thereof into court, to be applied in satisfaction of the sum of \$..... so found due and costs, upon the confirmation of said sale.¹

No. 540.

Decree of Foreclosure and Determining the Priority of Liens.

This cause came on to be heard upon the petition, the answer of the defendants C. D., E. A. D., the cross petition of G. H., the reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that the defendants, C. D. and E. A. D. his wife, executed and delivered to the plaintiff the mortgage deed set forth in said petition upon the following described real estate, to-wit: [*describe as in mortgage*], and that said mortgage was duly recorded on the day of, 18...,

¹ The decree merely finds the amount due, and subjects the security to be sold for its satisfaction. No judgment is rendered. But in case of a deficiency after a sale of the security the court may order its payment and award execution.

in the record of mortgages in county, and is a first lien on said real estate.

The court also finds that there is due to the plaintiff upon the notes set forth in said petition, which said mortgage was given to secure, the sum of \$....., and that the plaintiff is entitled to a foreclosure of said mortgage as prayed.

The court also finds that the defendants C. D. and E. A. D. executed and delivered to G. H. the mortgage deed set forth in his cross petition, upon the above described premises, which mortgage was given to secure the payment of the promissory note described in said cross petition, which mortgage was duly recorded in the record of mortgages of said county on the day of, 18..., and is a second lien on said premises, and subject to the lien of the plaintiff, and that there is due thereon to said G. H. the sum of \$.....

It is therefore considered by the court that in case the defendants C. D. and E. A. D. fail for twenty days from the entry of this decree to pay the plaintiff the sum of \$....., and also said G. H. the sum of \$....., that the defendants' equity of redemption be foreclosed, and said mortgaged premises shall be sold, and an order of sale shall issue to [*the sheriff*] of county, commanding him to sell the above described premises, as upon execution, and bring the proceeds thereof into court, to be applied in satisfaction of the sums so found due in the order of their priority as above found, upon the confirmation of said sale.¹

No. 541.

-When One or More, but not All, of a Series of Notes are Due.

This cause came on to be heard upon the petition, answer of the defendants, C. D. and E. A. D., the reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that the defendants C. D. and E. A. D. his wife, executed and delivered to the plaintiff the mortgage deed set forth in said petition, upon the following described real estate, to-wit: [*describe as in mortgage*], and that said mortgage was duly recorded in the record of mortgages of county on the

¹ In a decree of foreclosure the names of the *defendants* should be stated, otherwise in case incumbrancers are made parties the decree will lack certainty.

..... day of, 18... The court also finds that said defendant C. D. made and delivered to the plaintiff the notes set forth in said petition, which said mortgage was given to secure, and that the first of said notes was due on the day of, 18..., and before the commencement of this action, and is unpaid, and that there is now due thereon the sum of \$....., and that the plaintiff is entitled to a foreclosure of said mortgage as prayed.

It is therefore considered by the court that in case the defendants fail for twenty days from the entry of this decree to pay the plaintiff the sum of \$....., the defendants' equity of redemption be foreclosed and said mortgaged premises shall be sold, and an order of sale shall issue to the sheriff of county, commanding him to sell the above described real estate as upon execution, and bring the proceeds thereof into court, to be applied in satisfaction of the sum so found due and costs, upon the confirmation of said sale.

No. 542.

Specific Performance.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that the plaintiff is entitled to the specific execution of the contract set forth in said petition.

It is therefore considered by the court that [*upon the payment by the plaintiff to the defendant of the sum of \$.....*] the defendant shall convey the premises described in said petition, to-wit: [*describe as in petition*], to the plaintiff by a good and sufficient deed, with covenants of general warranty, and that in default thereof this decree shall have the same effect and operation as such deed. And that the plaintiff recover from the defendant his costs herein expended taxed at \$.....

No. 543.

To Set Aside a Deed Obtained by Fraud.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on con-

sideration whereof the court finds that the defendant obtained the deed of conveyance set forth in said petition from the plaintiff by fraud and misrepresentation, as alleged in said petition.

It is therefore considered by the court that the deed of conveyance, described in said petition, from the plaintiff to the defendant for the [*describe premises as in petition*], be and the same hereby is vacated, set aside, and annulled, and declared of no force and effect. And that the plaintiff recover from the defendant his costs in the action taxed at \$.....

No. 544.

To Set Aside Deed Made for the Purpose of Defrauding Creditors.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that the deed set forth in said petition was made with the intent to hinder, delay, and defraud creditors, of all which said [*grantee*] had full knowledge at the time of receiving the same [*or, and (said grantee) paid no consideration whatever for the same*].

It is therefore considered by the court that the deed described in said petition from the plaintiff to [*name of grantee*] for the [*describe premises as in petition*] be and the same hereby is vacated, set aside, and annulled, and declared of no force or effect, and that the plaintiff recover his costs in this action taxed at \$.....

No. 545.

To Set Aside a Fraudulent Deed and Subject the Property to Payment of Debts.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that the deed set forth in said petition was made with the intent to hinder, delay, and defraud creditors, of all which said [*grantee*] had full knowledge at the time of receiving the same.

The court also finds that there is due from the defendant E. F. to the plaintiff, on the judgment set forth in said petition, the sum of \$.....

It is therefore considered by the court that the deed described in said petition from E. F. to the defendant G. H. for the [*describe premises*] be and the same is hereby vacated, set aside, and

annulled, and that said land be subjected to payment of the debt set forth in the petition, and the sheriff of county is directed to proceed as upon execution to sell said lands and bring the proceeds thereof into court to await its further orders.

No. 546.

For an Injunction and Conveyance of Real Estate.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds, upon the issue joined, in favor of the plaintiff.

It is therefore considered by the court that the injunction heretofore granted in this action be and the same hereby is made perpetual.

It is further considered that said defendant convey to the plaintiff, by a deed in fee simple, all his right, title, and interest in the premises described in said petition, to-wit: [*describe as in petition*], which deed he is required to deliver to the clerk of this court on or before the day of, 18..., for the plaintiff's use, and that the plaintiff recover his costs herein expended taxed at \$.....

No. 547.

Temporary Injunction Made Perpetual.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds, upon the issue joined, in favor of the plaintiff.

It is therefore considered by the court that the injunction heretofore granted in this cause be and the same hereby is made perpetual, and that the plaintiff recover from the defendant his costs herein expended taxed at \$.....

No. 548.

Injunction.

[*Copy finding in preceding form.*]

It is therefore considered by the court that the defendant be and he hereby is perpetually enjoined from [*state the acts sought to be restrained*], and that the plaintiff recover from the defendant his costs in the action taxed at \$.....

No. 549.

Judgment in Partition.

This cause came on to be heard upon the petition, the answers of C. D., E. F., G. H., and I. J., minor defendants, by K. L., their guardian, and the evidence, and was submitted to the court, on consideration whereof the court finds that the plaintiff and the defendants each are the owners in fee simple of the undivided one-[*fifth*] part of the following described real estate, to-wit: [*describe premises*], and that the plaintiff is entitled to partition of said premises.

It is therefore considered by the court that said shares of each of said parties, and their said interests respectively in said land, be and the same hereby are confirmed, and that partition be made accordingly. It is further ordered that M. N., O. P., and Q. R. be and they hereby are appointed referees to make partition of said real estate into the requisite number of shares, and report the same at the present [*or next*] term of this court.

No. 550.

Mechanics' Lien. Decree of Sale.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and, a jury being waived, was submitted to the court, upon consideration whereof the court finds that there is due to the plaintiff from the defendant, upon the account set forth in said petition, the sum of \$....., and that on the day of, 18..., the plaintiff made an account in writing of the items set forth in said petition, and after making oath thereto filed the same in the county clerk's office of county, and the same is duly recorded therein, and is a mechanics' lien upon the following described premises, to-wit: [*describe premises*], and that the plaintiff is entitled to have said lien enforced.

It is therefore considered by the court that the plaintiff recover from the defendant C. D. the sum of \$..... and his costs expended in the action. And in case said judgment is not paid within twenty days from the entry of this judgment,* that an order issue to the sheriff of county commanding him to sell said premises as upon execution, and apply the proceeds thereof in payment of the amount so found upon the confirmation of said sale.

No. 551.

Order to Lease on Foreclosure of Mechanics' Lien.

Follow the preceding form to the*, then say:

It appearing to the court that said building is a fixture, and is erected upon ground to which the defendant has merely an equitable title, the sheriff of said county is directed to lease said building until the rents or issues thereof shall pay the sum so as above found due.

No. 552.

Judgment of Ouster in Quo Warranto.

This cause came on to be heard upon the information, pleas, and testimony, and was submitted to the court, on consideration whereof the court finds that the defendant is guilty of intruding into the office of, and of unlawfully holding and exercising the same as charged in the information.

It is therefore considered by the court that the defendant be and he hereby is ousted and excluded from said office and from all its franchises, privileges, and emoluments, and that he forthwith deliver over to the relator all the books, papers, and property belonging to said office, and that the relator recover from the defendant his costs in this action, taxed at \$.....

No. 553.

Ouster from Franchise.

This cause came on to be heard upon the information, pleas, and testimony, and was submitted to the court, on consideration whereof the court finds that the defendant has been exercising and carrying on the business of banking without authority and in violation of the law of its incorporation, and it has thereby forfeited its corporate rights, privileges, and franchises.

It is therefore considered by the court that said corporation be and hereby is ousted and excluded from such corporate rights, privileges, and franchises, and that said corporation be and the same hereby is dissolved.

No. 554.

Judgment in Quo Warranto for the Defendant.

This cause came on to be heard upon the information, pleas, and testimony, and was submitted to the court, on consideration

whereof the court finds upon the issue joined in favor of the defendant.

It is therefore considered by the court that said information be dismissed and the defendant go hence without day, and recover from the relator his costs in this action taxed at \$.....

No. 555.

Change of Name of Person.

This cause came on to be heard upon the petition and the testimony, and was submitted to the court, on consideration whereof the court finds that the plaintiff has been a *bona fide* citizen of county for at least one year prior to the filing of the petition, and that he has given due notice of the intended application for change of name by publication in the, a newspaper printed in said county, for thirty days immediately before filing said petition, and the court, being satisfied by proof in open court of the truth of the allegations set forth in said petition, and that there exist proper and reasonable causes for changing the name of the petitioner,

It is therefore considered by the court that the name of the petitioner be and the same hereby is changed to, as prayed, and that he pay the costs of this action taxed at \$.....

No. 556.

Changing Name of Town.

This cause came on to be heard upon the petition and the testimony, and was submitted to the court, on consideration whereof the court finds that due notice of the intended application in said petition was given by publication in the, a newspaper printed in county, for thirty days before filing said petition, and the court, being satisfied that the prayer of the petition is reasonable and just, and that two-thirds of the legal voters of such town desire the change now prayed for in said petition, and that there is no other town, city, or village in the state of the name prayed for,

It is therefore considered by the court that the name of said town of be and the same hereby is changed to as prayed, and that the petitioners pay the costs of this action.

No. 557.

Judgment for Maintenance in Bastardy.¹

It is therefore adjudged by the court that the defendant is the reputed father of said child, and that he stand charged with the maintenance thereof in the sum of \$....., to be paid as follows: [*state times and manner of payment*], and also pay the costs in this proceeding, and he is hereby required to give security in the sum of \$..... to perform this order, and in case he neglect or refuse to give security as aforesaid, and pay said costs, that he be committed to the jail of said county, there to remain until he comply with the order of the court.

No. 558.

Divorce for Adultery.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds that said parties were married, as set forth in said petition, and that the defendant committed adultery with, as alleged in the petition.

It is therefore considered by the court that the marriage relation heretofore existing between said parties be and the same hereby is set aside and wholly annulled, and the parties released from the obligations of the same, and that the defendant pay the costs of this action taxed at \$.....

No. 559.

Where Service is had by Publication.

This cause came on to be heard upon the petition, and the evidence was submitted to the court, on consideration whereof the court finds that due notice of the filing and pendency of this petition was given to the defendant according to law, and that said parties were married, as set forth in the petition, and that the defendant has been willfully absent from the plaintiff without good cause for two years prior to filing the petition.

It is therefore considered by the court that the marriage relation heretofore existing between said parties be and the same hereby is set aside and wholly annulled and the parties released

¹ See Laws of 1875, 53.

from the obligations of the same, and that the plaintiff pay the costs of this action taxed at \$.....

No. 560.

Decree for Defendant.

This cause came on to be heard upon the petition, answer, reply, and the evidence, and was submitted to the court, on consideration whereof the court finds upon the issue joined for the defendant.

It is therefore considered by the court that this action be and the same hereby is dismissed, and that the defendant go hence without day, and recover from the plaintiff her costs therein expended taxed at \$.....

No. 561.

For Custody of Children.¹

After entering a decree for a divorce add: And it is further ordered that the care, custody, nurture, and education of the children of the parties in this action, to-wit: [*give names*], be, until the further order of the court, confided exclusively to, and is hereby enjoined from meddling with or in any wise interfering with either of said children.

No. 562.

For Alimony.

After the decree for divorce add: And the court further finds that said defendant is possessed of real and personal property of the value of \$..... over and above all incumbrances.

It is therefore considered that said defendant pay to the plaintiff within ... days from this date the sum of \$....., etc. [*If the alimony is in property particularly describe the property assigned.*]

¹ An order of this kind may be modified by the court at any time the welfare of the children may require it.

CHAPTER XXV.

ARREST AND BAIL.

Section 153 of the code provides that: An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, made before any judge of any court of the state or clerk thereof, or justice of the peace, stating the nature of the plaintiff's claim, that it is just, the amount thereof, as nearly as may be, and establishing one or more of the following particulars:

First. That the defendant has removed, or begun to remove, any of his property out of the jurisdiction of the court, with the intent to defraud his creditors.

Second. That he has begun to convert his property, or a part thereof, into money for the purpose of placing it beyond the reach of his creditors.

Third. That he has property or rights in action which he fraudulently conceals.

Fourth. That he has assigned, removed, disposed of, or has begun to dispose of, his property, or a part thereof, with intent to defraud his creditors.

Fifth. That he fraudulently contracted the debt or incurred the obligation, for which suit is about to be or has been brought.

The affidavit must also contain a *statement of the facts* claimed to justify the belief in the existence of one or more of the above particulars.

The above provisions do not apply to proceedings for contempt, nor to actions or judgments prosecuted in the name of the state to recover fines or penalties for crimes or misdemeanors.

No. 563.

Form of Affidavit.

In the District Court of County:

William Wentworth, plaintiff, }

v.

Henry Mathewson, defendant. }

The plaintiff herein being first duly sworn, deposes and says that he has commenced an action in said court against the defendant to recover from him the sum of \$..... upon an account for goods sold and delivered by the plaintiff to the defendant at his request; that said claim is just, and there is now due thereon the sum of \$..... Plaintiff further says that the defendant fraudulently contracted the debt, for which suit is now brought, by representing to this affiant that he possessed property consisting of houses and lots, in the city of, of the value of \$....., which property was entirely free from incumbrances; and relying upon said representations the plaintiff sold and delivered the goods in question to the defendant. Affiant further states that said representations of the defendant were wholly false, that said defendant was not at the time of making said representations, nor is he now the owner of houses and lots in the city of, but was at that time and now is wholly insolvent. The plaintiff therefore asks that an order of arrest may issue against said defendant, and that he be held to bail in the sum of \$..... [*double the amount of the debt*].

Subscribed in my presence, and sworn to before me in said county, this day of, 18...

K. L., *Clerk of the District Court.*

No. 564.

By Agent or Attorney.

E. F., being first duly sworn, deposes and says that he is the authorized agent [*or attorney*] of the above named plaintiff, etc.

No. 565.

Undertaking.

Whereas, the plaintiff has commenced an action in the district court of county against the defendant, and has made application for an order for the arrest of the defendant;

Now therefore, we, H. I. and J. K., do undertake to the defendant in the sum of \$..... [*insert double the amount of the plaintiff's claim*], that the plaintiff shall pay to the defendant all damages not exceeding the sum above stated, which he may sustain by reason of said arrest if the order therefor be wrongfully obtained.

H. I.

J. K.

Executed in my presence and sureties approved by me this day of....., 18...

K. L., *Clerk of the District Court.*

No. 566.

Order of Arrest.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county.

Whereas, A. B. has commenced an action in the district court of county against C. D., and has filed his affidavit therein stating that there is due him from said defendant the sum of \$....., for which sum he prays judgment.

You are therefore commanded forthwith to arrest said C. D. if he can be found within your county, and hold him to bail in the sum of \$..... [*double the amount of the debt*].

You will make due return of this order and your proceedings thereon on the day of, 18...; with any undertaking of bail given by said C. D.

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

No. 567.

Undertaking of Bail.

Whereas, in an action pending in the district court of county, where A. B. is plaintiff and C. D. defendant, said plaintiff seeks to recover from said defendant the sum of \$....., and has caused an order of arrest to issue in said cause under which said defendant has been arrested, and is now in the custody of the sheriff of said county, and desires to be released therefrom.

Now therefore, we, E. F. and G. H., hereby undertake to

said plaintiff in the sum of \$..... [*double the amount claimed*], that if judgment be rendered in this action against the defendant he will render himself amenable to the process of the court thereon, or in case of his default will pay said judgment and costs.

E. F.

G. H.

Executed in my presence this day of, 18...

G. H., *Sheriff*.

No. 568.

Forms of Returns.

July 1, 18... Received this order, and, as commanded, I have arrested the body of said C. D., and have delivered to him a certified copy of the order of arrest and a copy of the affidavit received herewith from the clerk [*and he thereupon executed, in my presence, the undertaking, which is herewith returned*].

No. 569.

Not Found.

July 1, 18... Received this order. After diligent search defendant not found.

No. 570.

Notice of Non-acceptance of Bail.

The plaintiff refuses to accept the bail taken by you on the order of arrest herein.

W. W.,

By S. H., *his Attorney*.

Date,

No. 571.

Notice of Bail Justifying.

To [*plaintiff, or his attorney*]: You are hereby notified that the bail in this action will justify before, judge of the district court of county [*or the clerk of said court, probate (county) judge, or justice of the peace*], at his office in the town of, on the day of, 18..., at o'clock ... M., *Sheriff*.

The notice may also be given by the defendant.

For the purpose of justification each of the bail must attend before the proper officer at the time and place mentioned in the

notice, and may be examined on oath or affirmation in such manner as the officer may think proper touching his sufficiency.

No. 572.

Indorsement of Allowance of Bail.

I find the bail in this case sufficient, and hereby allow the same. J. J.

[*Judge, Clerk of the Court, Probate Judge, or Justice of the Peace.*]

Date,

No. 573.

Notice of Motion to Vacate Order of Arrest.

Take notice that on the day of, 18..., at ... o'clock ... M., or as soon thereafter as I can be heard, I will move before J. J., judge of the district court of county, at his residence in county, to vacate the order of arrest in this action, at which time and place I will file affidavits to disprove the allegations of the affidavits filed by you to obtain said order.

No. 574.

Motion to Vacate Order of Arrest.

The defendant moves the court to vacate the order of arrest in this action and discharge the defendant, for the following reasons:

First. Because the facts stated in the affidavit upon which said order was granted are not sufficient to justify the issuing of the same.

Second. Because the allegations and facts stated in said affidavit are untrue.

H. M.,

By S. H., *his Attorney.*

No. 575.

Order of Discharge.

The motion of the defendant to be discharged from arrest came on to be heard upon the original affidavit, the counter-affidavits of the defendant, and the affidavits of the plaintiff in reply, and was submitted to me [*or the court*], on consideration whereof I find said order of arrest was wrongfully obtained, and the same is hereby vacated and the defendant discharged from the arrest made under said order.

The remedy by arrest and bail, which during the early years of the present century seems to have been one of the principal remedies relied on for the collection of debts, at the present time is encumbered with so many conditions that it is practically of very little value, and resort should not be had to it except in a *very clear case*.

CHAPTER XXVI.

REPLEVIN.

The plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property. Code, § 181.

An order for the delivery of personal property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing—

First. A description of the property claimed.

Second. That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the same.

Third. That the property is wrongfully detained by the defendant.

Fourth. That it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any fine, tax, or amercement assessed against him, or by virtue of any order of delivery issued under this chapter, or any other *mesne* or final process issued against him; *Provided*, That such affidavit may omit the first and last clause of this subdivision, and in lieu thereof show that the property was taken in execution on a judgment or order other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under the laws of this state. Laws of 1877, pages 9 and 10.

For forms of petitions see *ante* page 232.

A general averment that the plaintiff is the owner of the property is a sufficient allegation of ownership.

No. 576.

Affidavit in Replevin.

A. B., plaintiff, [or agent, or attorney of the plaintiff], being first duly sworn, deposes and says that he has commenced an action in the district court of county against C. D. to recover the possession of the following described personal property, to-wit: [*describe property*]; that the plaintiff is the owner of said property and is entitled to the immediate possession thereof; and that said property is wrongfully detained by the defendant;* that it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any fine, tax, or amercement assessed against him, or by virtue of an order of delivery issued under the chapter providing for the replevin of property, or any other *mesne* or final process issued against him.

A. B.

Subscribed, etc.

If the plaintiff has a *special* property only in the goods, state his interest as in the petition, *ante* page 232. To maintain the action the plaintiff must be entitled to the *immediate possession* of the property. See *Williams v. West*, 2 O. S., 83.

No. 577.

Affidavit where Exempt Property is Taken.

Follow the preceding form to the *, then say, that said property was seized under an execution issued on a judgment in favor of E. F., and against the plaintiff, but consisted of articles which are specified in the statute as exempt from execution; that the plaintiff was at the time of levying said execution and now is a resident of this state and the head of a family, and then claimed and now claims said property as exempt, and said property was not subject to levy under said execution.

A. B.

No. 578.

Order of Delivery.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, A. B. has commenced an action in the district court

of county against C. D. to recover the possession of the following specific personal property, to-wit: [*describe property*], and has filed the necessary affidavit to obtain an order for the delivery of the same;

You are therefore commanded to seize and take into your custody, wherever the same may be found in your county, the property above described, and deliver the same to the said A. B.

You will make due return of this order on the day of, 18...

Witness my hand and the seal of said court, this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

The mode of executing the writ is by taking the property therein described.

No. 579.

Appraisement of Property.

We, the undersigned, two responsible persons, having been selected by G. H., sheriff of county, to value the property hereinafter described, taken on an order of delivery in the suit of A. B. v. C. D., after being first duly sworn, upon actual view of said property do assess the value thereof as follows: [*specify the articles and the value of each*], said goods being of the aggregate value of \$.....

S. T.

W. V.

No. 580.

Plaintiff's Undertaking.

Whereas, an order for the delivery of the following goods and chattels, to-wit: [*describe them*], has been issued out of the district court of county, in an action pending therein, wherein A. B. is plaintiff and C. D. defendant, and under said writ the sheriff of said county has taken said goods and chattels, which have been valued by two responsible persons under oath, at the sum of \$.....

Now therefore we, L. M. and N. O., do undertake to the said C. D. in the sum of \$....., that the said A. B. shall duly prosecute the action and pay all costs and damages which may be

awarded against him, and return the property to the defendant in case judgment for a return of such property is rendered against him.¹

L. M.

N. O.

Executed in my presence and sureties approved by me, this
..... day of, 18...

G. H., *Sheriff*.

No. 581.

Return upon Writ.

Sept. 1, 1879. Received this writ, and on the same day I took the goods and chattels within described, and have caused them to be valued by the oaths of S. T. and W. V., two responsible persons, whose valuation in writing, made and signed by them, is herewith returned.* I have taken the undertaking of L. M. and N. O. in the sum of \$....., which is herewith returned, and have delivered said goods and chattels to said A. B.

I also on said day delivered to C. D. a true and certified copy of this order.

G. H., *Sheriff*.

If the plaintiff fail to give the undertaking, follow the above to the *, then add: And the plaintiff having failed to give the undertaking required by law within twenty-four hours from the taking of the property, I re-delivered said property to the defendant.

No. 582.

Exceptions to Sufficiency of Sureties.

You are hereby notified that I except to the sufficiency of the sureties on the undertaking given on the part of the plaintiff in the action of replevin pending in the district court of county, in an action wherein A. B. is plaintiff and C. D. defendant.

C. D.,

By S. H., *his attorney*.

The sureties must justify upon notice, as in case of bail on arrest. See *ante* page 421.

¹ Code, § 186.

For form of answer see *ante* page 344. If the jury find in favor of the defendant they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages. *School District v. Shoemaker*, 5 Neb., 36. *Farrell v. Humphrey*, 12 Ohio, 113. *Franklin v. Kelly*, 2 Neb., 118.

No. 583.

Verdict for the Plaintiff.

We, the jury, duly impaneled and sworn in the above entitled cause, find that the right of property and right of possession of said property when this action was commenced was in the plaintiff, and assess his damages in the premises at the sum of \$.....

L. M., *Foreman*.

No. 584.

Verdict for the Defendant.

We, the jury duly impaneled and sworn in the above entitled cause, find that the right of property and right of possession of said property at the commencement of this action was in the defendant, and we assess the value of said property at the sum of \$..... We also assess the damages sustained by him, by reason of the detention of said property, at the sum of \$.....¹

L. M., *Foreman*.

No. 585.

Verdict for Defendant; Right of Possession.

We, the jury duly impaneled and sworn in the above entitled cause, find that at the commencement of this action the defendant was entitled to the possession of the property, and that the value of such possession is the sum of \$..... We also assess the damages sustained by him by reason of the detention of said property to the present time at the sum of \$.....

L. M., *Foreman*.

No. 586.

Verdict in Part for Plaintiff and in Part for Defendant.

We, the jury duly impaneled and sworn in the above entitled cause, find that at the commencement of the action the plaintiff

¹ Under our statute requiring a return of the property, or its equivalent in case a return cannot be had, it is necessary for the jury to find the value of the property or the value of the possession.

had the right of possession in and to the following goods and chattels described in said writ of replevin, to-wit: [*describe them*], and we assess his damages in the premises at the sum of \$..... We also find that at the commencement of this action the defendant had the right of property and was entitled to the possession of the remainder of the goods described in said writ, and we assess the value thereof at the sum of \$..... We also assess the damages sustained by the defendant by the detention of said property at the sum of \$.....

No. 587.

Judgment for Plaintiff.

It is therefore considered by the court that the plaintiff recover from the defendant the sum of \$....., his damages as assessed by the jury, and also his costs herein expended taxed at \$.....

No. 588.

Judgment for the Defendant.

It is therefore considered by the court that the defendant have a return of the property taken on said writ of replevin, or in case a return of said property cannot be had, that he recover of said plaintiff the value thereof, assessed at \$....., and his damages for withholding the same assessed at \$..... and costs of suit, taxed at \$.....

No. 589.

Judgment v. Plaintiff on Demurrer.

This cause came on to be heard upon the demurrer of the defendant to the petition of the plaintiff, and was submitted to the court, on consideration whereof the court finds that said petition does not state facts sufficient to constitute a cause of action.

It is therefore considered that the demurrer thereto be and the same hereby is sustained, and the plaintiff, not desiring to amend his petition, on motion of the defendant it is ordered that a jury be impaneled to inquire into the right of the defendant to the property or possession of the goods in question.

A jury may be waived and the damages assessed by the court.
Baker v. Dailey, 6 Neb., 464.

No. 590.

Judgment by Default for Plaintiff.

This cause came on to be heard upon the petition of the plaintiff, the defendant being in default of an answer, and a jury being waived was submitted to the court upon the petition and evidence, on consideration whereof the court finds that at the commencement of this action the plaintiff had the right of possession of the property mentioned in said petition, and that he has sustained damages by the unlawful withholding of said property in the sum of \$.....

It is therefore considered, etc.

When an action of replevin is dismissed by the court for irregularity or defects in the proceedings by the plaintiff, judgment may be given in favor of the defendant on proof of the value of the property and the award of damages. Laws of 1875, page 44.

CHAPTER XXVII.

ATTACHMENT.

Section 198 of the code provides that: The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

First. Where the defendant or one of several defendants is a foreign corporation, or a non-resident of this state; or,

Second. Has absconded, with the intent to defraud his creditors; or,

Third. Has left the county of his residence to avoid the service of a summons; or,

Fourth. So conceals himself that a summons cannot be served upon him; or,

Fifth. Is about to remove his property, or a part thereof, out

of the jurisdiction of the court, with the intent to defraud his creditors; or,

Sixth. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

Seventh. Has property or rights in action which he conceals; or,

Eighth. Has assigned, removed, or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud his creditors; or,

Ninth. Fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought.

Section 199. *An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the preceding section when there is filed in his office an affidavit of the plaintiff, his agent, or attorney, showing—*

First. The nature of the plaintiff's claim.

Second. That it is just.

Third. The amount which the affiant believes the plaintiff ought to recover.

Fourth. The existence of some one of the grounds for an attachment enumerated in the preceding section.

No. 591.

Affidavit for an Attachment.

A. B., plaintiff, being first duly sworn, deposes and says that he has commenced an action against C. D. in the district court of county to recover the sum of \$..... now due and payable to the plaintiff from the defendant, upon an account for goods sold and delivered by the plaintiff to the defendant, at his request. Affiant further says that said claim is just, and that he ought, as he believes, to recover thereon the sum of \$....., and that the defendant C. D. so conceals himself that a summons cannot be served upon him.¹

A. B.

Subscribed, etc.

¹ An affidavit for an attachment which states the grounds therefor in the language of the statute is sufficient. It is not necessary to state the facts and circumstances on which the allegations are based. *Tallon v. Ellison*, 3 Neb., 73. *Ellison v. Tallon*, 2 Id., 15.

If made by the agent or attorney it may be in the following form:

....., the authorized agent [*or attorney*] of A. B., being first duly sworn, etc.

No. 592.

Undertaking.

Whereas, A. B. has commenced an action in the district court of county against C. D. to recover the sum of \$....., and has filed the necessary affidavit to obtain an order of attachment against him;

Now therefore we, L. M. and N. O., do hereby undertake to said C. D., defendant, in the penal sum of \$..... [*not exceeding double the amount of the plaintiff's claim*], that the plaintiff shall pay the defendant all damages, not exceeding the above amount, which he may sustain by reason of the attachment in this action if the order therefor be wrongfully obtained.

L. M.

N. O.

I hereby approve the above undertaking and the sureties thereon.

K. L., *Clerk of the District Court.*

No. 593.

Order of Attachment.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, A. B. has filed the necessary affidavit [*and undertaking*] to obtain an order of attachment against C. D., in an action wherein A. B. is plaintiff and C. D. defendant, now pending in the district court of county, to recover the sum of \$.....;

Therefore you are commanded to attach the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the defendant in your county not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim of \$..... [*state amount as in affidavit*], and the probable costs of this action, not exceeding fifty dollars.

You will make due return of this order on the day of, 18... [*or forthwith if issued after the commencement of the action*].

Witness my hand and the seal of said court, this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

The sheriff must go to the place where the defendant's property may be found, and there, in the presence of two residents of the county, declare that by virtue of said order he attaches said property at the suit of such plaintiff. And the officer, with the said residents, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisement of the property attached, which shall be signed by the officer and residents and returned with the order.

Where the property attached is real property the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order.

Where it is personal property and accessible, he shall take the same into his custody and hold it subject to the order of the court.

No. 594.

Inventory and Appraisement of Property Attached.

We, G. H., sheriff of county, and O. P. and Q. R., two residents of county, the said O. P. and Q. R. being first duly sworn by me to make a true inventory and appraisement of all property attached as the property of C. D., on an order of attachment issued in an action wherein A. B. is plaintiff and C. D. defendant, now pending in the district court of county, do make the following inventory and appraisement of said property, to-wit:

1,000 bushels of corn, in crib.....	\$250 00
1 threshing machine, Pitts' patent, No.,	300 00

Given under our hands this day of, 18....

G. H., *Sheriff.*

O. P.

Q. R.

No. 595.

Undertaking for the Re-delivery of the Property.

Whereas, G. H., sheriff of county, has on this day of, 18..., attached certain goods and chattels in the hands of S. T. on an order of attachment issued out of the district court of county, in an action pending therein wherein A. B. is plaintiff and C. D. defendant, which property is appraised at the sum of \$....., and which property is now delivered to S. T. at his request.

Now we, S. T. as principal and U. S. as surety, do hereby undertake to the plaintiff in the sum of \$..... [*double the appraised value*] that said property, to-wit: [*describe property*], or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action.

S. T.

U. S.

Executed in my presence and approved by me this day of, 18...

G. H., *Sheriff*.

No. 596.

Sheriff's Return.

July 1, 18..., received this order, and, according to the command thereof, I did, on the same day, at ... o'clock ... M., in the presence of O. P. and Q. R., two residents of county, attach the following goods and chattels, to-wit: one thousand bushels of corn in crib, and one threshing machine, Pitts' patent, No. ...; and after administering an oath to said O. P. and Q. R. to make a true inventory and valuation of said property in writing, I then with them made an inventory and appraisalment of said property, which is herewith returned. The property so attached was delivered to S. T., in whose possession it was found, he having given an undertaking with sufficient sureties for the forthcoming of the same, which undertaking is herewith returned. I also, on the same day, delivered to the defendant a certified copy of this writ.

G. H., *Sheriff*.

Dated,, 18...

No. 597.

Return to Second Order of Attachment.

July 1, 18...; received this order, and I did on the same day, at ... o'clock ... m., in the presence of O. P. and Q. R., two residents of county, attach the following goods and chattels, to-wit: [*describe them*], heretofore attached on an order issued out of this court in an action pending therein, wherein A. B. is plaintiff and C. D. defendant, to which return I herewith refer. I also at the same time delivered to said defendant a certified copy of this order.

If the property attached is real estate the sheriff must leave with the occupant thereof, if there be one, a copy of the order, although he may not be a party to the suit. If there is no occupant the copy must be placed in a conspicuous place on the land.

No. 598.

Return of no Property Found.

July 1, 18... Received this order. After diligent search and inquiry I can find no property or effects of the defendant in my county.

No. 599.

Order for the Sale of Perishable Property.

THE STATE OF NEBRASKA, COUNTY.¹

To the sheriff of said county:

Whereas, it appears that the property attached in this case is of a perishable nature [*or consists of live stock, and the cost of keeping the same will be so great that it is for the interest of all parties to have the same sold*].

You are therefore commanded to sell the following property attached in this action as upon execution, to-wit: [*describe property*], upon ... months credit, with approved security. You will make due return of this order, and a certificate thereon showing the manner in which you have executed the same in ... days from the receipt hereof.

Witness my hand this day of, 18...

E. F., *Judge of the District Court.*

¹ The constitution requires all process to run in the name of "The State of Nebraska," § 24, Art. VI.

No. 600.

Order to Sheriff to Re-take Property.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

It appearing to the court that certain property heretofore attached, in an action pending herein, wherein A. B. is plaintiff and C. D. defendant, as the goods and chattels of C. D., to-wit: [*describe property*], has passed out of the hands of the sheriff without being sold or converted into money,

You are therefore ordered to proceed, according to law, to repossess yourself of said property so attached wherever the same may be found.

Witness my hand and the seal of said court this day of, 18...

[L. S.]

K. L., *Clerk of the District Court.*

No. 601.

Order Appointing a Receiver of Attached Property.

On motion of the plaintiff and for good cause shown it is hereby ordered that L. M. be and he hereby is appointed receiver in this action to take possession of all notes, due bills, books of account, accounts, and all other evidences of debt, that have been taken by the sheriff as the property of the defendant in the attachment in this action, upon his taking the oath and giving an undertaking as required by law to the state of Nebraska in the sum of \$....., with security to be approved by the clerk.

The receiver shall forthwith give notice of his appointment to the persons indebted to the defendant in the attachment. The notice shall be written or printed, and shall be served on the debtor or debtors personally, or by copy left at the residence.

No. 602.

Undertaking of Receiver.

Whereas, on the day of, 18..., L. M. was duly appointed receiver of the property heretofore attached in an

action pending in the district court of county, wherein A. B. is plaintiff and C. D. defendant;

Now therefore, we, L. M. as principal and N. O. as surety, hereby undertake to the state of Nebraska in the sum of \$..... that said L. M. shall faithfully perform his duty as such receiver, and pay over all money, and account for all property which may come into his hands by virtue of his appointment, at such times and in such manner as the court may direct.

L. M.

N. O.

I hereby approve of the above undertaking, and the security to the same this day of, 18...

K. L., *Clerk of the District Court.*

No. 603.

Undertaking to Have an Attachment Discharged.

Whereas, A. B. has commenced an action in the district court of county against C. D. to recover the sum of \$....., and an order of attachment has been issued therein, under which certain property of said C. D. has been attached, and said C. D. is desirous of having said attachment discharged;

Now therefore, we, C. D. as principal and E. F. as surety, do undertake to said A. B. in the sum of \$..... [*double the appraised value*], that said C. D. shall perform the judgment of the court in this action.

C. D. -

E. F.

I hereby approve the above undertaking and the surety thereon this day of, 18...

K. L., *Clerk of the District Court.*

Service by publication. It is only cases where the defendant is a non-resident of the state, or has absconded, or conceals himself so that service of summons cannot be made upon him in the state, that service can be made by publication. See the fifth subdivision of section 77 of the code. For forms of affidavit and notice see *ante* page 50.

No. 604.

Motion to Discharge Attachment.

The defendant moves the court to discharge the attachment in this action for the following reasons:

First. Because the facts stated in the affidavit are not sufficient to justify the issuing of the same.

Second. Because the statements of fact in said affidavit are untrue.

C. D.

By S. H., *his Attorney.*

No. 605.

Notice of Motion to Discharge Attachment.

To A. B.:

You are hereby notified that on the day of, 18..., at ... o'clock ... M., or as soon thereafter as I can be heard, I will apply to the district court of county for an order to discharge the attachment heretofore issued in an action pending in said court, wherein A. B. is plaintiff and C. D. defendant, from the whole of the property attached. [*You are also notified that I will file affidavits to disprove the allegations in the affidavit filed by you to obtain the attachment.*]

C. D.,

By S. H., *his Attorney.*

A judge at chambers has no authority to discharge an attachment. The order must be made by the court, and is subject to review. See Gen. Stat., 715.

Rule as to filing affidavits. Where the motion to discharge the attachment is made upon affidavits on the part of the defendant, or other evidence and papers in the case, he should be required to file all the affidavits and evidence on which he intends to rely to secure a dissolution of the attachment; the plaintiff will then be permitted to file affidavits or other evidence to sustain the attachment, but only upon the grounds assigned in the affidavit upon which it was obtained. He cannot be permitted to assign *new grounds of attachment* as a reason for sustaining it.

A reasonable time should be given, if necessary, to enable the parties to procure and file their affidavits.

Second motion to discharge attachment. Where there is an omission through inadvertence or want of knowledge of a material fact to state all the reasons for the dissolution of an attachment which existed at the time of filing the first motion, a second motion *on leave of court* may be filed in which may be included the matter omitted. *Livingston v. Coe*, 6 Neb., 380, 381.

No. 606.

*Affidavit Against Garnishee.*¹

A. B., plaintiff [*or agent, or attorney of the plaintiff*], being first duly sworn, deposes and says that he has good reason to believe and does believe that [*state name of person or corporation*], and within said county of, has property of the defendant in his possession, to-wit: [*describe property*], and also that said is indebted to the defendant in an amount unknown to affiant.

A. B.

Subscribed, etc.

No. 607.

*Notice to Garnishee.*²

To: You are hereby notified to appear in the district court of county on the day of, 18..., to answer under oath all the questions put to you touching the property of every description and credits of the defendant C. D., in your possession or under your control. And this you will in no wise omit, under the penalty of the law.

G. H., *Sheriff*.

Dated;

No. 608.

Examination of Garnishee.

On the day of, 18..., the garnishee in this action appeared before the court, and after being duly sworn as required by law, testified as follows:

¹ If an affidavit for an *attachment* has been filed this form is sufficient.

² The garnishee is not required to appear unless there is tendered to him the same fees as a witness. Laws of 1877, 11. As to the time he is required to appear, see Laws of 1877, 10.

Question. State if you have any property or effects of C. D. in your possession or under your control.

Answer.

Question. State if you are indebted to C. D.

Answer.

Question. [*To a corporation.*] State if there is any stock held or owned by C. D. in your corporation.

Answer.

[Signed]

No. 609.

Attachment Against Garnishee for Contempt.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, was duly notified by the sheriff of this county to appear in this court on the day of, 18..., and answer as garnishee, under oath, all questions put to him touching the property of every description and the credits of C. D. in his possession or under his control; and whereas, said has wholly failed to appear and answer as such garnishee, as required by law;

Therefore this is to command you to attach the said and forthwith bring him before the court to answer for said contempt.

Of this writ and your proceedings thereon forthwith make return.

Witness my hand and the seal of said court this day of, 18....

[L.S.]

K. L., *Clerk of the District Court.*

No. 610.

Order to Garnishee to Deliver Property.

It appearing from the answer of, garnishee, that he has personal property of the defendant C. D. subject to attachment in his possession, it is therefore ordered that said deliver said property, to-wit: [*describe property*], to the sheriff of this county [*or receiver*] within days from this date.

If the garnishee refuse to comply with the order he cannot be ar-

rested for contempt, and the only remedy of the party against him is by suit.¹

The garnishee is entitled to any defense in his favor which existed at the time he was served with notice.

No. 611.

Undertaking of Garnishee for Delivery of Property or Payment of Money.

Whereas, in an action pending in the district court of county, wherein A. B. is plaintiff and C. D. defendant, one has been garnisheed, and, after due notice as required by law, has appeared in said court and answered under oath that he has certain property of said C. D. in his possession, to-wit: [*describe property as in answer of garnishee*], [*or is indebted to C. D. in the sum of \$.....*]; and whereas, said is desirous of retaining said property [*or money*] until the further order of the court;

Now therefore, we,,, undertake to the said A. B. that the property above described shall be forthcoming² as the court may direct, [*or that said, garnishee, shall pay into court the amount owing by him to said defendant, to-wit: the sum of \$....., as the court may direct*].

No. 612.

Return of Service on Garnishee.

Jan. 1, 18..., received this writ, and not being able to "come at" the property of C. D., claimed to be in the possession of, I, on the same day, at ... o'clock ... M., served on, garnishee [*or by leaving at his usual place of residence*] a certified copy of this order, and also a written notice to appear on the day of, 18..., and answer as therein required, a copy of which notice is hereto attached. G. H., Sheriff.

No. 613.

*Corporation Served as Garnishee.*³

Jan. 1, 18..., received this writ, and not being able to "come at" the property of C. D., claimed to be in the possession of

¹ See § 225 of the code. *Dolby v. Tingley*, 9 Neb., 418. § 200 of the Ohio code provides for issuing an execution against the garnishee where he admits an indebtedness.

² The statute places no limit in the amount of the undertaking. The sureties therefore will be liable for the full value of the property.

³ Municipal corporations are not subject to process of garnishment. *The People v. The Mayor*, 2 Neb., 166.

[*name of corporation*], I, on the same day, at ... o'clock in thenoon, served said corporation with a certified copy of this order and a written notice, a copy of which is hereto attached, to appear on the day of, 18..., and answer as therein required, by leaving a certified copy of this order and notice with [*the president, secretary, cashier, or managing agent, as the case may be*] of said corporation.

G. H., *Sheriff*.

The court may compel the delivery to the sheriff of any of the attached property for which an undertaking may have been given, and may proceed summarily on such undertaking to enforce the delivery of the property or the payment of such sum as may be due upon the undertaking, by rules and attachments as in cases of contempt.

The court may also order the sheriff to repossess himself, for the purpose of selling it, of any of the attached property which may have passed out of his hands without having been sold or converted into money.

No. 614.

Order to Garnishee Giving an Undertaking to Show Cause.

Whereas, on the day of, 18..., one, garnishee, executed and delivered to the sheriff of county an undertaking to the plaintiff, with as surety, to the effect that certain property therein described, of the value of \$....., should be forthcoming as the court should direct; and whereas, said [*garnishee*] has failed and refused to deliver over said property as required by the order of this court, made on the day of, 18...;

It is therefore ordered by the court that said [*garnishee and surety*] be notified to appear forthwith and show cause why judgment should not be rendered against them in favor of the plaintiff upon said undertaking for the full value of said property.

No. 615.

Notice to Garnishee to Appear and Show Cause.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of county:

You are commanded to notify [*the garnishee and surety*] forthwith to appear before the district court of county to show

cause why judgment for the sum of \$...... should not be rendered against them, upon an undertaking executed by them to the plaintiff on the day of....., 18.... Conditioned that [the garnishee] should deliver the following described property, to-wit: [describe property], as the court may direct, and on the day of, 18..., the court made an order that said [garnishee] deliver said property to the sheriff of said county, which he has failed and refused to do.

You will forthwith make due return of this writ and your proceedings thereon.

Witness my hand and the seal of said court this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

Final judgment cannot be rendered against the garnishee until the action against the defendants in the attachment has been determined; and if in such action judgment be rendered for the defendant in attachment the garnishee will be discharged and recover costs.

No. 616.

Order Vacating Attachment.

This cause came on for hearing upon the motion of the defendant to vacate and discharge the attachment heretofore granted in this cause, and was submitted to the court, on consideration whereof it is ordered that the attachment heretofore granted in this action be and the same hereby is vacated and discharged, and the sheriff is required to return to the defendant all the property taken by him under said attachment, and the garnishee is released and discharged from all liability in the action.

No. 617.

Order of Reference to Determine the Question of Priority of Liens.

It appearing to the court that several attachments have been levied on the property attached in this action, therefore the matter is referred to K. L., clerk of this court, to ascertain and report to the court the amount due on the several attachments and the order of priority thereof.

No. 618.

Judgment Against Garnishee.

This cause came on for hearing upon the motion of the plaintiff for judgment against the garnishee, and was submitted to the court, upon consideration whereof the court finds that the plaintiff has obtained judgment against C. D. for the sum of \$....., which still remains unpaid, and that said [garnishee] has failed to pay the sum of \$....., held by him as such garnishee upon giving the undertaking required by law.

It is therefore considered by the court that the plaintiff recover from the defendants [garnishee and surety] the sum of \$....., and also his costs expended in this proceeding taxed at \$.....

No. 619.

Judgment for the Plaintiff and Order of Sale of the Attached Property

This cause came on to be heard upon the petition [*the answer of the defendant*] and the evidence, and a jury being waived, was submitted to the court, on consideration whereof the court finds that the defendant is indebted to the plaintiff upon the cause of action set forth in the petition, in the sum of \$.....

It is therefore considered by the court that the plaintiff recover from the defendant the sum of \$....., and the costs of this action taxed at \$..... And it is ordered that the sheriff proceed as upon execution to advertise and sell so much of the property heretofore attached in this action as will satisfy the aforesaid judgment and costs.

No. 620.

Judgment by Default on Service by Publication.¹

This cause came on to be heard upon the petition and the evidence, and was submitted by the plaintiff to the court, on consideration whereof the court finds that due and legal service

¹ Before rendering judgment by default the court should examine the record and see that the affidavit and notice are in proper form; that the notice has been published for the length of time required by law, and that the evidence of such publication is on file.

by publication has been made upon the defendant in the time and manner required by law, and that said defendant has failed to appear and answer, but is in default. The court also finds that there is due from the defendant to the plaintiff, upon the cause of action set forth in said petition, the sum of \$.....

It is therefore considered, etc. [*as in preceding form*].

No. 621.

Garnishment After Judgment.¹ Form of Summons.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

You are hereby commanded to notify E. F. to appear in the district court of county on the day of, 18..., to answer under oath all questions touching the goods, chattels, rights, and credits of C. D. in his possession or under his control. You will make due return of this summons on the day of, 18...

Witness my hand and the seal of said court this day of, 18.....

[L. s.]

K. L., *Clerk of the District Court.*

No. 622.

Attachment on Claim Before it is Due.

A creditor may bring an action on a claim before it is due, and have an attachment against the property of the debtor in the following cases:

First. Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts.

Second. Where he is about to make such sale, conveyance, or disposition of his property with such fraudulent intent.

Third. Where he is about to remove his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts.

¹ Code, § 244.

No. 623.

Affidavit for an Attachment on a Claim Before Due.

A. B., plaintiff, being first duly sworn, deposes and says that he is about to commence an action against the defendant in the district court of county to recover the sum of \$....., upon a promissory note, for the sum of \$....., made and delivered by the defendant to the plaintiff on the day of, 18..., and which will become due on the day of, 18... Affiant further states that said claim is just, and that there will be due thereon, on the day of, 18..., the sum of \$..... Affiant further states that the defendant is about to remove his property, or a material part thereof, with the intent of cheating and defrauding his creditors [*here state the facts showing the intent*].¹ Affiant therefore asks for an order granting an attachment against the property of the defendant.

A. B.

Subscribed in my presence and sworn to before me this day of, 18....

K. L., Clerk of the District Court.

No. 624.

Order Allowing an Attachment.

On application of the plaintiff, and it appearing from the affidavit of the plaintiff [*and other evidence produced before me*] that the claim is just, and that there is cause for granting an attachment, an order of attachment in the sum of \$....., and \$..... probable costs of the action, is therefore allowed to issue in this case, upon the plaintiff giving an undertaking for the sum of \$....., with approved security, as required by law.

J. J., Judge of the District Court.

Dated,, 18...

¹ The better practice is to set forth in the affidavit, not merely a repetition of the language of the code, but also a statement of the facts and circumstances, such as ordinarily evince and disclose the intent, purpose, or effect in the disposition of property as injurious to the rights of creditors. *Seidentopf v. Annabil*, 6 Neb., 524.

CHAPTER XXVIII.

RECEIVERS.

A receiver may be appointed by the supreme court, or the district court, or by the judges of either, in the following cases:

First. In an action by a vendor to recover a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of any party to the suit, when the property or fund is in danger of being lost, removed, or materially injured.

Second. In an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt.

Third. After judgment or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal.

Fourth. In all cases provided for by special statutes.

Fifth. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.

No receiver shall be appointed except in a suit actually commenced and pending, and after notice to all parties to be affected thereby of the time and place of the application, the names of the proposed receiver and of his sureties, and of the proposed sureties of the applicant.

Such notice shall state upon what papers the application is based, and be served upon the adverse party or his solicitor at least five days before the proposed hearing, and one additional day for every thirty miles of travel from the place of serving the notice to the place where the application is to be made, by the usually travelled route, or shall be published in the same manner as notices of the pendency of suits to non-resident defendants.

Should the delay occasioned by the giving the notice provided . .

for in the preceding section be hazardous to the rights of any party, the court or judge may by order direct the sheriff of the county in which the action is pending to take temporary possession of the property, and shall appoint an early day for the hearing of the application; and if at such hearing the application is refused, restitution shall be made of the property to the party from whom the same was taken.

Every order appointing a receiver shall require the applicant to give a bond conditioned to pay all damages which the other parties to the suit, or any of them, may sustain by reason of the appointment of a receiver, in case it shall be finally decided that the order ought not to have been granted, and shall also require the receiver to give a bond conditioned to faithfully discharge his duties as receiver and obey all orders of the court.

Said bonds shall each run to the defendant and all adverse parties in interest, and be for the use of any party to the suit, and be in a penal sum equal to double the value of the property in question, and be executed by two or more sureties, to be approved by the court or judge making the appointment, and be filed in the office of the clerk of the district court, nor shall the same be considered executed until they are so filed. § 269, as amended, Laws of 1875, page 36.

If the plaintiff shall desire the appointment of receiver at the commencement of the action he shall pray such appointment in his petition.

If the occasion for a receiver shall arise while the suit is pending the application shall be made by a petition entitled in the cause, signed and verified by the applicant, and setting forth facts and circumstances making such appointment necessary or proper.

Any party to the suit may, upon the hearing of the application, show by affidavit or otherwise objections to the proposed sureties and to the proposed receiver, and what is the value of the property to be taken possession of, and that a receiver ought not to be appointed. He may also nominate a person to be receiver, giving at the same time the names of his proposed sureties.

No person shall be appointed receiver who is a party, solicitor, counsel, or in any manner interested in the suit.

Every order appointing a receiver shall contain special directions in respect to his powers and duties, and upon the application of any party to the suit, after due notice thereof, such further directions may be made in that behalf by the court or judge as may in the further progress of the cause become proper.

Every receiver shall be considered the receiver of any party to the suit, and no others.

Every order appointing a receiver without the notice provided for herein shall be void.

All orders appointing receivers, giving them further directions and disposing of the property, may be appealed to the supreme court in the same manner as final orders and decrees.

Whenever in the exercise of their authority the court or judge shall have ordered the deposit or delivery of money or other things, and the order is disobeyed, the court or judge, in addition to punishing such disobedience as for contempt, may make an order requiring the sheriff to take the money or things, and deposit or deliver it in conformity with the direction of the court or judge.

No. 625.

Notice of Application for a Receiver.

To [*the defendant or his attorney*]:

You are hereby notified that on the day of, 18..., at ... o'clock ...M., or as soon thereafter as I can be heard, I will apply to the district court of county for the appointment of a receiver of all the partnership property of C. D. & Co., set forth in the petition, upon the ground that C. D. and have excluded the plaintiff, who is a partner, from participation in the partnership business, and in support of such application I will file and read the affidavits of,, and I propose the name of G. H. as receiver, with and as his sureties; I also offer as sureties for myself and

A. B., *Plaintiff.*

By S. J., *his attorney.*

No. 626.

Motion to Appoint Receiver.

The plaintiff moves the court for the appointment of a receiver in this action: 1st—To collect the debts and sell the

partnership property belonging to the firm of C. D. & Co., upon the ground that C. D. and, members of said firm, have excluded the plaintiff, who is a partner, from taking any part in the business of said firm.¹

A. B.,

By S. J., *his Attorney.*

No. 627.

Order Appointing Receiver.

This cause came on to be heard upon the motion of the plaintiff for the appointment of a receiver, and was submitted to the court upon petition, the motion and the affidavits accompanying the same, on consideration whereof the court finds that the plaintiff is a member of the firm of C. D. & Co., and that the defendants have excluded him from participation in the business or affairs of said firm, and that C. D. and are applying the partnership property to their own use.

It is therefore ordered that G. H. be appointed receiver of the partnership stock, debts, and effects of the partnership of C. D. and Company, and said plaintiff and defendants are hereby directed to deliver the same to said receiver. And said receiver is authorized and required without unnecessary delay to sell and convert into money such portions of the copartnership effects as do not consist of money, and to pay all debts due and to become due from said firm.

It is further ordered that before he enters upon his duties as such receiver he execute and deliver to the clerk of this court an undertaking, with approved sureties, to the defendants in the sum of \$....., conditioned according to law.

And it is further ordered that said receiver on the [*first Monday*] of each month make report to the court of his doings in this behalf.

No. 628.

Bond of Receiver.

Know all men by these presents that we as principal, and, as sureties, are held and firmly bound to [*the defendant and adverse parties in interest*] in the penal sum of \$.....,

¹ See Edw. on Receivers, 329. *Wilson v. Greenwood*, 1 Swanst, 481. *Williamson v. Wilson*, 1 Bland Ch., 481. 1 Van Santvoord's Eq. Pr., 394-5. High on Receivers, § 522.

for the payment of which well and truly to be made we hereby bind ourselves. Dated this day of, 18...

Whereas, has been duly appointed by the district court of county [*or by the judge of such court*] receiver in an action pending in said court, wherein is plaintiff and,, defendants;

Now therefore, the condition of this obligation is such that if the said [*receiver*] shall faithfully discharge his duties as receiver, and obey all orders of the court in respect thereto, and shall duly account for what shall come to his hands or control as such receiver, then this obligation to be null and void, otherwise to remain in full force and effect.

....., *Principal.*

..... } *Sureties.*

The above bond and the sureties to the same are hereby approved this day of, 18...

....., *Judge of the District Court.*

NO. 629.

Bond of Applicant.

Know all men by these presents that we, as principal and and as sureties, are held and firmly bound [*to the defendant and adverse parties*] in the penal sum of \$....., for the payment of which well and truly to be made we hereby bind ourselves. Dated this day of, 18...

Whereas, on the application of the above bounden [*principal*], has been appointed by the district court of county receiver in an action pending in said court, wherein is plaintiff and,, are defendants;

Now therefore, the condition of this obligation is such that if [*the principal*] shall pay all damages which the above named parties, or any of them, may sustain by reason of the appointment of a receiver in case it shall be finally decided that the order ought not to have been granted, then this obligation to be null and void, otherwise to remain in full force and effect.

....., *Principal.*

..... } *Sureties.*

The above bond and the sureties to the same are hereby approved this day of, 18.,.

....., *Judge of the District Court.*

No. 630.

Order Appointing a Referee when the Decree does not Determine the Rights of the Parties.

It is hereby ordered that this cause be referred to L. A. A. to take the examination of the defendant E. F., and such other evidence as may be produced before him under oath, as to the property, things in action, and equitable interests in controversy in this case, and report the same to the court with all convenient speed.

And it is further ordered that the defendant appear before said referee when required by him to do so, and produce the books of account, notes, and papers belonging to said firm, and also to testify before said referee as to all matters in relation thereto which he may lawfully be required to disclose.

No. 631.

Order Requiring the Receiver to Bring an Action.

Upon the application of, the receiver herein, and upon his statement that is justly indebted to said firm in the sum of \$...... upon an account, the court, therefore, hereby authorizes and directs said receiver to commence an action against said upon said account for the recovery of said sum, and interest thereon.

No. 632.

Form of the Action.

1. The plaintiff, as receiver, complains of the defendant, and alleges that on the day of, 18..., upon the application of, a member of the co-partnership of C. D. and Co., he was, by an order of the district court of county, duly appointed receiver of the partnership property, books of account, notes, and papers belonging to the firm of C. D. & Co., and that on the day of, 18..., he gave his bond required by said order, approved by the judge of said court, which is now on file in said court.

2. [*State cause of action.*]

As a general rule a receiver should pay out nothing without an order of the court. Fletcher v. Dodd, 1 Ves. Jr., 85. Edw. on Rec., 121, 564. And he cannot declare a dividend, in ordinary cases, without the sanction of the court. High on Rec., § 175.

In cases where the fund held by a receiver is not distributable until after the final hearing, the decree should direct to whom and in what manner it shall be paid.

But where funds are in the hands of the receiver which are due to creditors or others, and which ought to be paid to them without waiting to the end of the controversy between the plaintiff and defendant, the persons thus entitled to such funds may present petitions to the court showing the nature and justice of their claims, and praying for payment thereof out of said fund.

All persons interested in the fund should be made parties.

In case of partnership, when the receiver has money on hand ready to be paid to the creditors of the firm, if he has received no directions for the payment of such claims he should present a petition to the court praying for direction to pay the same. See Edwards on Receivers, pages 565-6.

NO. 633.

Petition of Receiver of Partnership Property to Pay Creditors of the Firm.

Your petitioner respectfully represents to the court that on the day of, 18..., he was duly appointed receiver of the effects of the firm of C. D. & Co., with power and directions to collect debts and convert the partnership property into money [*recite the substance of the order*]; and your petitioner thereupon gave the bond required by said order of the court, which was duly approved, and thereupon entered upon his duties as such receiver, and in the discharge of his duties has collected of the debts due said firm the sum of \$....., and has sold property belonging to said firm to the amount of \$....., as appears by the schedule hereto attached, marked "Ex. A."

Your petitioner further represents that said firm is indebted as he believes to various persons, as follows:

E. F. & Co.....	\$.....
G. H.....	\$.....
I. J. & Co.....	\$.....

Your petitioner believes that the above named persons are *bona fide* creditors of said firm, and he knows of no others having a claim against the same.

Your petitioner therefore prays for an order directing him, as receiver in this action, to distribute *pro rata* the above stated sum among said creditors, and for such other order as justice may require.

No. 634.

Order Directing Distribution.

This cause came on for hearing upon the petition of [*the receiver*], praying for leave to distribute the sum of \$....., now in his hands as receiver, among the *bona fide* creditors of the firm of C. D. & Co., and was submitted to the court upon the petition and the evidence, on consideration whereof it is ordered by the court that said [*receiver*] distribute said sum of \$..... *pro rata* between the *bona fide* creditors of the firm of C. D. & Co. See *Law v. Ford*, 2 Paige, 310.

If the partnership is insolvent the order should provide for filing claims against the firm by a day to be named in the order, before making the distribution, so that an equal distribution may be made between all the creditors.

A receiver is an officer of the court, and his possession is the possession of the court, and his only powers are those conferred upon him by the order appointing him. *Skip v. Harowood*, 3 Atk., 564. *Cook v. Gwyn*, Id., 690. *Verplank v. Ins. Co.*, 2 Paige, 452. 1 Vansantvoord Eq., 375.

His appointment is for the purpose of preserving the property or subject of litigation from loss or destruction during the pendency of the suit, and he is appointed for the benefit of parties not strangers to the action. *Howell v. Ripley*, 10 Paige, 43.

If the receivership interferes with the rights of a stranger he may apply to the court for the protection of his rights. *Howell v. Ripley*. And the court will make such order in the premises as is necessary to protect the stranger's rights. *Vincent v. Parker*, 7 Paige, 65.

If a receiver has lawful possession of property, it is contempt for a third person to attempt, without leave of the court, to deprive

him of it by action or other proceeding. *Hubbell v. Dana*, 9 How., 24. *Noe v. Gibson*, 7 Paige, 513. *Albany Bank v. Schermerhorn*, 9 Id., 372.

But it is not essential to the jurisdiction of a court of law, in an action for damages against a defendant corporation which is in the hands of a receiver, that leave to prosecute should first be obtained from the court appointing the receiver. *Kinney v. Crocker*, 18 Wis., 74. *Paige v. Smith*, 99 Mass., 395. *Hill v. Parker*, 111 Id., 508. *Allen v. Cent. R. R.*, 42 Iowa, 683.

The receiver being appointed for the benefit of all the parties to the action, cannot employ the attorney of either party. *Ryckman v. Parkins*, 5 Paige, 543. But if the object is to create or obtain a fund for the joint benefit of all the parties, he is not thus prohibited. *Bennett v. Chapin*, 3 Sand., 673.

Carrying on business. A court will not undertake to carry on the business of a partnership of any kind longer than is absolutely necessary to prevent the property being sacrificed; but until a sale can be effected the receiver may carry on the business in the usual manner, in order that the purchaser may obtain the good-will of the business, and thus the full value of the property be realized. *Jackson v. De Forrest*, 14 How. Pr., 81. *Allen v. Hawley*, 6 Fla., 164. *Walbert v. Harris*, 3 Halst. Ch., 605.

A receiver may be discharged for misconduct and a new one appointed, and when he shows reasonable cause he may be discharged on his own motion. *Beers v. The Chelsea Bank*, 4 Edw. Ch., 277.

The duties of the receiver of a railroad company entrusted with the management and operation of the road are very different from those of a passive receiver appointed merely to collect and hold moneys due on prior transactions, or rents accruing from houses or lands. To such outlays in ordinary course may properly be referred not only the keeping of the road, buildings, and rolling stock in repair, but also the providing of such additional accommodations, stock, and instrumentalities as the necessities of the business may require, always referring to the court or master for advice, etc. *Cowdrey v. The R. R. Co.*, 1 Wood, 331. High on Receivers, § 392.

No. 635.

Application by Plaintiff or Defendant to Compel the Receiver to Account.

1. Your petitioner respectfully represents to the court that this is an action for an accounting between the members of the firm of C. D. & Co., and your petitioner is one of the members of said firm.

2. On the day of, 18..., one G. H. was, by an order of this court, duly appointed receiver in this cause, and immediately thereafter took possession of the entire property and effects of said firm, of the value of \$....., and has sold large portions of said property and collected a large amount of said debts, but the exact amount of which your petitioner is unable to state.

3. Many of the debts due from said partnership, which should be paid out of the assets of said firm, yet remain due and unpaid, and their payment is necessary to a full and complete settlement of the business of said co-partnership.

4. Said [receiver] neglects and refuses to sell the remainder of said property or to collect the outstanding debts due said firm, and refuses to account to the members of said firm, or to inform them as to the condition of said partnership affairs. [*State any facts showing unnecessary delay.*]

5. After the payment of all partnership debts and the settlement of all liabilities against said firm, your petitioner alleges that there will be due to him about the sum of \$....., which cannot be had until said receiver shall reduce said partnership assets to money and render an account for the same.

Your petitioner therefore prays that the court will direct said receiver forthwith to sell the remainder of said partnership property, pay the remainder of the partnership debts, and render an account of his doings in the premises.

No. 636.

Order Directing the Receiver to Dispose of the Property, and to Account.

This cause came on for hearing upon the application of, and after due notice to [the receiver] was submitted to the court upon the application and the evidence, on consideration whereof it is ordered and said [receiver] is directed forthwith to sell the

residue of the partnership property remaining in his hands, and to collect and convert into money all the assets and effects of said firm remaining unsold, and pay all debts owing by said firm, and thereupon render to this court a full and correct account of all of said moneys collected and expended by him.

The discontinuance of an action does not discharge a receiver appointed therein, but he may apply for his discharge and have his account examined and passed upon by the court, so that he may pay over whatever balance there may be in his hands, and thus discharge himself and sureties from further liability, unless the interests of the defendants require that he should retain the receivership to protect their rights. Edw. on Rec., 627. White-side v. Pendergast, 2 Barb. Ch., 471.

NO. 637.

Application of Receiver to Pass his Accounts and be Discharged.

Your petitioner respectfully represents to the court that on the day of, 18..., he was duly appointed receiver of [*recite the substance of the order of appointment*], and thereupon gave the bond required by law and entered upon the duties of said receivership, and his duties as such receiver having terminated by [*state the cause*] your petitioner therefore is desirous of passing his accounts, paying the balance due, and being discharged from all liability thereon, and that he be paid his reasonable costs and charges.

Your petitioner therefore prays, etc.

Notice of the application should be given to all parties interested in the action.

NO. 638.

Inventory Accounts.

A correct inventory of the whole of the real and personal estate belonging to the firm of C. D. and Co., committed to the care of, the receiver appointed herein by an order of the district court of county, and of the manner in which said property and funds belonging to said partnership have been disposed of, and the application of the proceeds thereof.

[*Make a complete inventory, and state what property has been sold,*

the price of each article, and the disposition of the funds arising therefrom. See forms, Edw. on Rec., pages 617-620.]

[*Verification.*]

No. 639.

Order Passing Account and Discharging Receiver.

This cause came on for hearing, upon the application of the receiver, for the examination of his accounts and final discharge, and after due notice to all parties interested therein the court finds that said account is correct, and that said receiver has obeyed the directions and orders of the court in all things, and has duly paid over all moneys coming into his hands as such receiver except the sum of \$....., which he is directed to pay to the clerk of this court for the use of the [*plaintiff*]. The court also finds that said receiver is entitled to the sum of \$..... for his services.

It is therefore ordered that said account be and the same hereby is approved and confirmed, and said [*receiver*] and the sureties on his bond be discharged from all liability thereon, and said receiver is hereby allowed the sum of \$..... for his services, to be paid out of the money in his hands.

CHAPTER XXIX.

INJUNCTIONS.

The injunction herein provided for is a command to refrain from a particular act. It may be the final judgment in an action, or may be allowed as a *provisional remedy*; and when so allowed it shall be by order. The writ of injunction is abolished.

When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff; or

when during the litigation it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

It may also be granted in any case where it is specially authorized by statute.

The injunction may be granted at the time of commencing the action, or at any time afterward before judgment, by the supreme court or any judge thereof, the district court or any judge thereof, or, in the absence from the county of said judges, by the probate [county] judge thereof, upon it appearing satisfactorily to the court or judge, by the affidavit of the plaintiff or his agent, that the plaintiff is entitled thereto.

Judges of the supreme court cannot grant temporary order of injunctions. Section 2 of Art. VI. of the constitution of 1875 provides that: "The supreme court shall consist of three judges, a majority of whom shall be necessary to form a quorum, or to pronounce a decision. It shall have *original* jurisdiction in cases relating to the revenue, civil cases in which the state shall be a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

The supreme court has *original* jurisdiction in cases of injunction when they relate to the revenue and the cases enumerated. In all other cases its jurisdiction is appellate, and in no case is a judge of that court authorized to grant an injunction. When section 252 was passed judges of the supreme court were also judges of the district courts.

If the court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to such party to attend for such purpose at a specified time and place, and may in the mean time restrain such party.

An injunction shall not be granted against a party who has answered, unless upon notice; but such party may be restrained until the decision of the application for an injunction.

No injunction, unless provided by special statute, shall op-

erate until the party obtaining the same shall give an undertaking executed by one or more sufficient sureties, to be approved by the clerk of the court granting such injunction, in an amount to be fixed by the court or judge allowing the same, to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted.

The order of injunction shall be addressed to the party enjoined, shall state the injunction, and shall be issued by the clerk.

Where the injunction is allowed at the commencement of the action the clerk shall indorse upon the summons "Injunction allowed," and it shall not be necessary to issue the order of injunction, nor shall it be necessary to issue the same when notice of the application therefor has been given to the party enjoined.

The service of the summons so indorsed, or the notice of the application for an injunction, shall be notice of its allowance.

Where the injunction is allowed during the litigation and without notice of the application therefor, the order of injunction shall be issued and the sheriff forthwith serve the same upon each party enjoined, in the manner prescribed for serving a summons, and make return thereof without delay.

An injunction binds a party from the time he has notice thereof and the undertaking required by the applicant therefor is executed.

An injunction must be allowed on a petition or a petition and affidavits, and cannot be granted on affidavits alone unless a petition has been filed. Badger v. Wagstaff, 11 How. Pr., 562. The People v. Com. Pleas, 3 Abb., 181.

The petition alone, if verified positively, may be used as a basis for an order of injunction, but if it is verified upon information and belief it must be accompanied by positive affidavits. Woodruff v. Fisher, 17 Barb., 229. Penfield v. White, 8 How., 287.

It is not within the scope of this work to discuss the instances where an injunction will be granted. The reader is referred to High on Injunctions for a review of the cases where an action for an injunction can be maintained.

The tendency of the courts at the present time is to extend

rather than restrict the remedy, and it will be granted in most cases where the plaintiff has no *adequate* remedy at law.

For forms of petitions see *ante* pages 262-288.

No. 640.

Verification of Petition for Injunction when Used as an Affidavit to Obtain the Order.

[Venue.]

I, A. B., plaintiff in the above entitled action, do solemnly swear that the facts stated in the foregoing petition are true.

A. B.

Subscribed, etc.

No. 641.

Notice to Show Cause.

[Title of Cause.]

To, defendant.

You are hereby notified that on the day of, 18..., the plaintiff filed his petition against you in the district court of county, claiming [*state the nature of the action and the remedy prayed for*], and on the day of, 18..., at ... o'clock ... M. he will apply to, judge of said court, at his residence in the town of for a temporary order of injunction restraining you as prayed for in said petition.

A. B.,

By S. J., *his Attorney.*

Dated,, 18...

No. 642.

Order Allowing Temporary Injunction.

2

Upon reading the petition of the plaintiff duly verified, and and for good cause shown, it is ordered that an injunction be granted herein enjoining the defendant from [*state what acts are enjoined*] until the further order of the court, upon the plaintiff executing and delivering to the clerk of the court an undertaking, with approved sureties, to the defendant in the sum of \$....., conditioned as required by law.

No. 643.

Restraining Order Allowed until the Hearing.

Upon application of the plaintiff for an injunction upon his petition, duly verified, and it being necessary that the defendant should have notice of the application before an injunction is

granted, it is therefore ordered that said cause be set for hearing on the day of, 18..., at ... o'clock ... M., at my residence in the town of, and that the plaintiff be required forthwith to notify the defendant of the time and place of said hearing, and that until the further order of the court a restraining order is allowed [*restraining the defendant from—state what acts*], upon the plaintiff executing an undertaking in the sum of \$....., as required by law.

No. 644.

Undertaking.

Whereas, in an action pending in the district court of county, wherein A. B. is plaintiff and C. D. defendant, the plaintiff has obtained an order of injunction against said defendant, upon his giving an undertaking in the sum of \$.....

Now therefore, we, A. B. as principal and G. H. as surety, hereby undertake to said C. D., defendant, in the sum of \$....., that said A. B., plaintiff, shall pay to the defendant all damages which he may sustain by reason of said injunction, if it be finally decided that the injunction ought not to have been granted:

A. B.
G. H.

Date.

I hereby approve of the undertaking and the sureties thereon this day of, 18...

K. L., *Clerk of the District Court.*

No. 645.

Order of Injunction.

THE STATE OF NEBRASKA, COUNTY.

To [*name of the defendant*], defendant:

Whereas, A. B. has, on the day of, 18..., filed his petition, duly verified, in the office of the clerk of the district court of county, against, defendant, and praying that said defendant be restrained from [*state what acts are enjoined*], and has duly obtained an order of injunction thereon, and given the undertaking required by law.

Now therefore, you, the said, defendant herein, are hereby enjoined from [*state what acts he is restrained from doing*].

And you are required strictly to observe this injunction under the penalties of the law.

Witness my hand and the seal of said court this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

When granted before the summons issues the clerk will indorse on the summons: "Injunction allowed." K. L., *Clerk.* And that is sufficient notice to the defendant.

No. 646.

Notice of Motion to Vacate or Modify.

To A. B., plaintiff:

You are hereby notified that on the day of, 18..., at ... o'clock ... M., or as soon thereafter as I can be heard, I will apply to [....., *judge of*] the district court of county, at the court house in said county, to vacate [*or modify*] the injunction heretofore allowed in this case, and will sustain said motion by affidavits, and also upon the insufficiency of the petition upon which the same was granted.

C. D.,

By Samuel Jones, *his Attorney.*

No. 647.

Motion to Vacate or Modify.

[Title of the Cause.]

The defendant moves the court to vacate [*or modify*] the injunction heretofore granted in this case, for the following reasons:

1. The petition does not state facts sufficient to authorize the issuing of the same.

2. The facts and allegations set forth in said petition upon which said injunction was granted are untrue.

C. D.,

By Samuel Jones, *his Attorney.*

No. 648.

Order Vacating Injunction.

This cause came on to be heard upon the motion of the defendant to vacate and set aside the injunction heretofore granted in

this case, and was submitted to me [*or the court*] upon the petition and affidavits of the parties, on consideration whereof* I sustain said motion, and said injunction is hereby vacated and set aside.

No. 649.

Order Modifying Injunction.

Follow the preceding form to the *, then say: It is hereby ordered that said injunction be modified, and hereby is so changed as to permit said defendant to [*state modifications*].

No. 650.

Motion Overruled.

Follow form No. 648 to the *, then say: said motion of the defendant is hereby overruled.

No. 651.

Affidavit of the Plaintiff or his Agent on Making Application to the County Judge for a Temporary Order of Injunction.

A. B., plaintiff in the above entitled action, being first duly sworn, deposes and says that, judge of the district court of county, is absent therefrom, and the affiant is desirous of obtaining a temporary order of injunction from the county judge of said county.

A. B.

Subscribed, etc.

No. 652.

Order of County Judge Granting Temporary Order of Injunction.

It satisfactorily appearing to me, from the affidavit of A. B., that, judge of the district court of county, is absent therefrom, and upon reading the petition [*and affidavits*] of the plaintiff, it is ordered that an injunction be granted herein enjoining the defendant from [*state what acts are enjoined*], upon the plaintiff executing and delivering to the clerk of the district court of said county an undertaking to the defendant in the sum of \$....., conditioned as required by law, with sureties to be approved by the clerk.

H. H., *County Judge of County.*

Date.

An injunction granted by a judge may be enforced as the act of the court.

Disobedience of an injunction may be punished as a contempt by the court, or by any judge who might have granted it in vacation.

An attachment may be issued by the court or judge, upon being satisfied by affidavit of the breach of the injunction, against the party guilty of the same, and he may be required, in the discretion of the court or judge, to pay a fine not exceeding two hundred dollars, for the use of the county, to make immediate restitution to the party injured, and give further security to obey the injunction; or in default thereof he may be committed to close custody until he shall fully comply with such requirement, or be otherwise legally discharged.

Where an injunction has been granted and an undertaking given, the party enjoined is bound from the time he has notice thereof, although the summons or order of injunction may not have been served upon him.

The party enjoined must obey the injunction until it is vacated or modified.

NO. 653.

Affidavit for an Attachment for Disobeying an Injunction.

A. B., the plaintiff in this action, being first duly sworn, deposes and says that the defendant C. D. has disregarded and disobeyed the injunction granted in this cause in the following particulars [*state the acts in violation of the injunction*].

A. B.

Subscribed, etc.

The case will be docketed:

The State of Nebraska }
v.
C. D. }

If in the opinion of the judge the party against whom the attachment is sought should have notice before issuing the same, and the case is not urgent, he may make an order to show cause. These orders, if granted by the district court, will be issued by the clerk; if granted by the judge in vacation, or by a county judge, must be issued by him. § 260.

No. 654.

Order to Show Cause.

Upon filing the affidavit of A. B. for an attachment against C. D., it is ordered that said C. D. be required to appear before me at on the day of, 18..., at ... o'clock ... M., to show cause why an attachment for contempt should not be issued against him for an alleged violation of the injunction heretofore granted by me in an action pending in the district court of county, wherein A. B. is plaintiff and C. D. defendant.

No. 655.

Attachment for Disobeying of Injunction.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

The undersigned, being satisfied from the affidavit of A. B., plaintiff, that the order of injunction heretofore granted and served in an action pending in the district court of county, wherein A. B. is plaintiff and C. D. defendant, has been violated and disobeyed by the defendant,

You are therefore commanded to attach said defendant, and bring him before me [*forthwith or*] on the day of, 18..., at ... o'clock ... M., then and there to answer for a contempt of court alleged against him in violating said injunction.

You will make due return of this writ and of your proceedings thereon.

Witness my hand this day of, 18...

R. S. J., *Judge of* Court.

No. 656.

Judgment for Disobeying an Injunction.

Now came the defendant C. D. in charge of the sheriff, thereupon the matter of the alleged contempt of the defendant came on for hearing and was submitted to me [*or the court*] on consideration whereof I find [*or the court finds*] that said defendant has been guilty of violating said injunction as charged in the affidavit.

It is therefore considered by me [*or the court*] that said defendant pay a fine of \$....., and the costs incurred in this prosecution taxed at \$.....

It is further considered and ordered that said defendant make

immediate restitution of the following described property, to-wit: [*describe it*] to the plaintiff A. B., and also that he enter into an undertaking to the plaintiff in the sum of \$..... to obey said injunction, and in default of his complying with any of said requirements he be committed to close custody by the sheriff of said county until he fully comply therewith, or be otherwise legally discharged.

No. 657.

Warrant for Commitment.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county :

Whereas, on the day of, 18..., C. D. was found guilty in a proceeding had before me of contempt for having violated an injunction heretofore granted in an action pending in the district court of, county, wherein A. B. was plaintiff and C. D. defendant, and was adjudged by me to [*state the substance of the above judgment*], which he has failed to do.

You are therefore commanded to take the body of said C. D. and him safely keep in close custody until he shall comply with said requirements, or be otherwise legally discharged.

Witness my hand this day of..... 18...

R. S. J., *Judge of the court.*

No. 658.

Undertaking to Obey the Order of Injunction.

Whereas, in a proceeding for a contempt against C. D. for disobeying an injunction heretofore granted in the case of A. B., plaintiff, against C. D., defendant, now pending in the district court of county, said C. D. was required to enter into an undertaking in the sum of \$..... to said A. B. to obey said order of injunction;

Now therefore, we, C. D. as principal and E. F. as surety, hereby undertake in the sum of \$..... to said A. B. that said C. D. shall in all things obey the aforesaid injunction.

C. D.

E. F.

I hereby approve the above undertaking and the surety thereon this day of, 18...

K. L., *Clerk of the District Court.*

CHAPTER XXX.

EVIDENCE, AND THE MODE OF PROCURING IT.

Every human being of sufficient capacity to understand the obligation of an oath is a competent witness in all cases, civil and criminal, except as otherwise herein declared.

The following persons are incompetent to testify:

First. Persons of unsound mind at the time of their production.

Second. Indians and negroes, who appear incapable of receiving just impressions of the facts respecting which they are examined.

Third. Husband and wife, concerning any communication made by one to the other during marriage, whether called as a witness while that relation subsists or afterward.

Fourth. An attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent in open court or in writing produced in court.

Fifth. A clergyman or priest, concerning any confession made to him in his professional character in the course of the discipline enjoined by the church to which he belongs, without the consent of the person making the confession.

When adverse party is an executor. No person having a direct legal interest in the result of any civil cause or proceeding, shall be a competent witness therein when the adverse party is an executor, administrator, or legal representative of a deceased person, unless the testimony of the deceased has been taken in his lifetime and is used on the trial.¹

Facts which have heretofore caused the exclusion of testimony may still be shown for the purpose of lessening its credibility.

The husband can in no case be a witness against the wife nor the

¹ Code, § 329, as amended, Laws of 1877, p. 13.

wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other.

Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

No practicing attorney, counselor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline.

Rights waived. The prohibitions in the preceding sections do not apply to cases where the party in whose favor the respective provisions are enacted waives the rights thus conferred.

A public officer cannot be examined as to communications made to him in official confidence when the *public* interests would suffer by the disclosure.

Civil liability no excuse. A witness is not excused from answering a question upon the mere ground that he would be thereby subjected to a civil liability.¹

NO. 659.

Subpœna for Witnesses.

THE STATE OF NEBRASKA, COUNTY.

To E. F., G. H., and I. J.:

You and each of you are hereby commanded to appear before the district court of county, at the court house therein, on the day of; 18..., at... o'clock ... M., to testify as a witness in a certain action pending in said court, wherein A. B. is plaintiff and C. D. defendant. Hereof fail not, under the penalty of the law.

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 18...

[L. S.]

K. L., *Clerk of the District Court.*

¹ 2 Code, §§ 330-336.

No. 660.

Subpœna Duces Tecum.

THE STATE OF NEBRASKA, COUNTY.

To G. H.:

You are hereby commanded to appear before the district court of said county, at the court house therein, on the day of, 18..., at ... o'clock ... M., and also to bring with you and produce at the aforesaid time and place [*describe what is required*], and to testify in, etc. [*as in preceding form*].

No. 661.

Return by an Officer.

On the day of, 18..., I served this subpœna on the within named by [*state the mode of service, as—by reading the same to him; or—by leaving a certified copy of the same at his usual place of residence*]. [*If the witness demands his fees, add:*] He demanded his fees, which were [*or were not*] paid. I. J. not found and not a resident of the county.

No 662.

Return if Served by a Person other than an Officer.

I, K. L., being first duly sworn, depose and say that I served this subpœna on the within named defendant [*state mode of service, as in preceding form*] on the day of, 18...

K. L.

Subscribed, etc.

Subpœnas, by whom issued. The clerks of the several courts and judges of probate [*county*] courts shall, on application of any person having a cause or any matter pending in court, issue a subpœna for witnesses under the seal of the court, inserting all the names required by the applicant in one subpœna, which may be served by any person not interested in the action, or by the sheriff, coroner, or constable; but when served by any person other than a public officer proof of such service shall be shown by affidavit. Code, § 350. *But no costs* of serving the same shall be allowed except when served by an officer. Id.

The subpœna shall be directed to the person therein named, requiring him to attend at a particular time and place to testify as a

witness; and it may contain a clause, directing the witness to bring with him any book, writing, or other thing under his control, which he is bound by law to produce as evidence.

The subpoena shall be served either by reading or by a copy delivered to the witness or left at his usual place of residence; but such copy need not contain the name of any other witness. § 353.

A witness shall not be required to attend for examination on the trial of a civil action, except in the county of his residence, nor to attend to give his deposition out of the county where he resides, or where he may be when the subpoena is made upon him. § 354.

A witness may demand his traveling fees and fees for one day's attendance when the subpoena is served upon him, and if the same be not paid the witness shall not be obliged to obey the subpoena. The facts of such demand and non-payment shall be stated in the return. § 355.

Disobedience of a subpoena, or a refusal to be sworn, or to answer as a witness, or to subscribe a deposition when lawfully ordered, may be punished as a contempt of the court or officer by whom his attendance or testimony is required. § 356.

Section 357 provides the mode of arresting the delinquent witness, or requiring him to show cause why an attachment should not issue, and section 358 fixes the punishment.

If he was not personally served the court may by a rule require him to show cause why an attachment should not issue against him.

NO. 663.

Rule to Show Cause why Attachment should not be Issued.

Whereas, on the day of, 18..., a subpoena duly issued by the clerk of this court was duly served upon, by leaving a copy at his place of residence and commanding him to appear before this court at the court house in on the day of, 18..., at ... o'clock ... M. of said day, then and there to testify on behalf of the [*plaintiff*] in an action pending in said court, wherein is plaintiff and defendant, and said has made default. On motion of the attorney for the [*plaintiff*] it is therefore ordered that a rule be

allowed against said, requiring him to appear [*designate time*] to testify as witness, and to show cause why an attachment should not be issued against him for disobeying the subpoena of this court.

A copy of the rule to show cause must be personally served on the witness, and he must appear at the time designated and show a satisfactory reason for his failure to obey the subpoena.

No. 664.

Judgment on the Rule Discharging Witness.

And now on this day came [*the delinquent witness*] and was duly examined in open court touching his disobedience of the subpoena of the court in this action, on consideration whereof the court finds* [*that said was absent from home at the time of the service of said subpoena, and was not informed that a copy thereof had been left at his residence until after the service of the rule to show cause*].

It is therefore ordered that said rule be discharged at the costs of the [*plaintiff*].

No. 665.

Judgment Imposing Punishment.

Follow the preceding form to the *, then say: that said subpoena was duly served on, and without any just cause or excuse he refused to attend in obedience thereto, and that he has thereby been guilty of a contempt.

It is therefore ordered and adjudged that said pay a fine of [*not more than \$50*] for this his contempt, and the costs of this proceeding taxed at \$.....

No. 666.

Attachment against Witness.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

You are hereby commanded to arrest, and have his body before the district court of county on the day of, 18..., at ... o'clock ... M. [*or forthwith*], to answer unto the state of Nebraska for a certain contempt lately committed by him in not attending as a witness after being duly served

with a subpoena in an action now pending in said court, wherein A. B. is plaintiff and C. D. defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 18...

[L. s.]

K. L., *Clerk of the District Court.*

If the order is to appear at a future time the court should fix the *amount* of the undertaking; otherwise it will be \$100.

No. 667.

Form of Return.

As commanded by the within writ I attached and have him here in court.

Dated this day of, 18... .., *Sheriff.*

The case will be entered on the docket thus :

The State of Nebraska }
v. }
..... }

No. 668.

Judgment of Dismissal.

And now on this day came [*the witness*] in charge of the sheriff, upon the attachment issued against him, and was duly examined in open court touching his disobedience of the subpoena of the court in this action, on consideration whereof the court finds* [*state grounds of excuse*].

It is therefore ordered that said attachment be discharged, at the costs of the [*plaintiff*].

No. 669.

Judgment Imposing Fine.

Follow the preceding form to the *, then say: that said is guilty of contempt in failing to obey said subpoena.

It is therefore ordered and adjudged that said pay a fine of \$..... and the costs of these proceedings.

If the witness refuses to be sworn, the above forms can readily be changed. If the punishment is imprisonment, the order may be as follows:

It is therefore ordered that be imprisoned in the jail

of county, and there to remain until he will submit to be sworn as a witness in said cause, or be otherwise discharged. It is further ordered that a warrant be issued for his commitment.

No. 670.

Warrant of Commitment.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, on the day of, 18..., was duly convicted of contempt of court for refusing to testify as a witness in an action pending in the district court of county, wherein A. B. is plaintiff and C. D. defendant, and it was then ordered by said court [*recite the judgment*].

You are therefore commanded to take the body of and him safely keep in your custody in the county jail of said county until he shall submit to be sworn in the above entitled cause, or is otherwise legally discharged.

In witness whereof I have hereunto set my hand and affixed the seal of said court, this day of, 18

[L.S.]

K. L., [*Clerk of the District Court.*]

No. 671.

Motion for the Production of Books and Papers.

The plaintiff moves the court for an order on the defendant, requiring him to permit the plaintiff to inspect and copy [*describe the book or paper desired*], which is in the custody of said defendant, and which is necessary and material to a just determination of this action. The plaintiff has reason to believe that said will establish the following facts, viz.: [*state what is expected to be proved, showing that it contains evidence relating to the merits of the case*].

A. B.,

By S. J., *his Attorney.*

The motion should be verified, or an affidavit made embodying the facts.

No. 672.

Order to Produce Books or Papers.

Now on this day the motion of the plaintiff for the produc-

¹ See *Baggett v. Goodwin*, 17 O. S., 81.

tion by the defendant of certain books [*or papers*] came on to be heard, and was submitted to the court, upon the motion and the affidavits of the plaintiff and defendant, on consideration whereof it is hereby ordered that the defendant, within days from this date, produce and leave in the care of the clerk of the court the following books, to-wit: [*describe them*], and that said plaintiff and his attorney have leave to examine and copy the same.

No. 673.

Demand of Adverse Party for an Inspection and Permission to Copy Papers, etc.

You are hereby notified that the [*defendant*] demands an inspection and copy or permission to take a copy of the [*describe the book or paper desired*], now in your possession [*or under your control*]. I will apply at your [*residence*] on the day of, 18..., for the purpose of inspecting said and copying the same. Unless you comply with this request within four days from the service of this notice I will ask an order from, judge of the district court, requiring you to permit me to inspect and copy said instrument.

C. D.,

By S. J., *his Attorney.*

Date, etc.

No. 674.

Proof of Service.

G. H., being first duly sworn, deposes and says that on the day of, 18..., he served a copy of the above demand and notice on A. B.

G. H.

Subscribed, etc.

If the book, paper, or instrument is in possession of the party upon whom the demand is made, he should at once permit an inspection and furnish a copy or permit one to be taken. If not in his possession or under his control, he should state that fact to the applicant; and if an order is sought to compel its production, resist the motion by affidavits. See *Baggett v. Goodwin*, 17 O. S., 81.

The provisions for the inspection of books and papers seem to be designed to enable a party to prepare his pleadings with full knowledge of the facts of the case, and to prepare for trial.

They do not prevent a party from compelling another by a subpoena *duces tecum* to produce any book, paper, or document in his possession or under his control which is proper to be given in evidence.

A party has no more right to refuse to produce a book, paper, or document pertinent to the issue and properly admissible in evidence than he has to refuse to answer a pertinent and proper question.

A witness confined in any prison in this state may, by order of any court of record, be required to be produced for oral examination in the county where he is imprisoned, but in all other cases his examination must be by deposition. Code, § 361.

No. 675.

Order for the Oral Examination of a Prisoner as a Witness.

It appearing to the court that it is necessary to have the oral testimony of, who is confined in the jail of county, on the trial of an action now pending in this court, wherein A. B. is plaintiff and C. D. defendant, on motion of the [defendant] it is therefore ordered that the sheriff bring said prisoner before the court on the day of, 18..., at ... o'clock ... M., for such oral examination.

No. 676.

Notice Requesting an Admission of the Genuineness of a Paper or Document.

You are hereby notified that I propose to offer in evidence on the trial of this cause the contract [or instrument in writing] hereto annexed and now exhibited to you, and I request you to give an admission in writing of the genuineness of the same.

C. D.,

By S. H., *his Attorney.*

Date, etc.

No. 677.

Admission of Genuineness.

I hereby admit that the above contract is genuine.

A. B.,

By S. J., *his Attorney.*

Date, etc.

No. 678.

Stipulation Admitting Certain Facts.

It is hereby stipulated by and between the parties to this action that for the purposes of the trial thereof the following facts are hereby admitted by both parties, to-wit: [*state the facts admitted*].

A. B.,

By S. J., *his Attorney.*

C. D.,

By S. H., *his Attorney.*

Date, etc.

No. 679.

Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the parties that the case shall be submitted to the court upon the following facts, to-wit: [*state in full, and sign as in preceding form*].

DEPOSITIONS.

The deposition of a witness can be used only in the following cases:

First. When the witness does not reside in the county where the action or proceeding is pending or is set for trial by a change of venue, or is absent therefrom.

Second. When from age, infirmity, or imprisonment the witness is unable to attend the court, or is dead.

Third. When the testimony is required upon a motion, or in any other case where the oral examination of a witness is not required. Code, § 372.

Before whom taken. Depositions may be taken in this state before a judge or clerk of the supreme or district court, or before a probate [*county*] judge, justice of the peace, notary public, mayor, or chief magistrate of any city or town corporate, or a special commission.

Depositions may be taken out of the state by a judge, justice or chancellor of any court of record, a justice of the peace, notary public, mayor or chief magistrate of any city or town corporate, or a commissioner appointed by the governor.

Requirements of notice. Prior to the taking of any deposition a written notice specifying the action, or proceeding, the name of the court or tribunal in which it is to be used, and the time

and place of taking the same, shall be served upon the adverse party, his agent, or attorney of record, or left at his usual place of residence. The notice must also specify the names of the witnesses to be examined.¹

The notice must be served so as to allow the adverse party sufficient time by the usual route of travel to attend and one day for preparation, exclusive of Sundays and the day of service.²

No. 680.

Notice to Take Depositions.

[Title of Cause.]

The defendant will take notice that on the day of, 18..., between the hours of 10 A.M. and 6 P.M., at the office of, in the county of and state of, the plaintiff above named will take the testimony of E. F., G. H., and I. J., witnesses in this action, to be used as evidence on the trial of the above entitled cause, with authority to adjourn from day to day until such depositions shall have been taken.³

A. B., *Plaintiff*,
By S. J., *his Attorney*.

Service of the notice may be acknowledged as follows:

Received a copy of this notice this day of, 18...

C. D., *Defendant*,
By S. H., *his Attorney*.

¹ Laws of 1875, page 37.

² *Id.*

³ To avoid mistakes the notice should have printed thereon instructions for taking depositions as a direction to the officer, as follows:

Depositions may be taken in the narrative form, or in the form of questions and answers.

If there are adjournments they should be noted by the officer before whom the deposition is being taken.

Objections should be entered to questions claimed to be improper. This entry is made on behalf of the party raising the objection by a short note made by the officer embodying the grounds of objection.

Each witness must sign his own deposition.

The notice must be attached to the depositions and inclosed with them.

The taking of depositions must be commenced *on the day named*, and some portion thereof must be taken on each successive day, Sundays excepted, adjournments being made from day to day.

Where depositions are taken by interrogatories and cross interrogatories, each interrogatory and cross interrogatory must be stated to the witness, and his answer to the same written out in full. For convenience the interrogatories should be numbered.

Or the following :

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the depositions may be taken is by agreement waived.

If the party refuses to accept notice a copy must be served upon him, proof of service being made by affidavit.

No. 681.

Forms of Depositions.

Depositions of witnesses taken before [*notary public*], to be used in an action, wherein A. B. is plaintiff and C. D. defendant, pending in the district court of county in pursuance of the annexed notice, and at the time and place therein stated. The plaintiff appeared in his own behalf [*the defendant failing to appear*], thereupon said plaintiff produced the following witnesses in their order, to-wit: E. F., who being by me first duly sworn, testified as follows :

[*Copy testimony.*]

[*Signature of witness.*]

Also G. H., who being by me first duly sworn, testified, etc.

[*Signature of witness.*]

No. 682.

Certificate to Depositions.¹

I, N. O., a notary public within and for the county of, in the state of, do hereby certify that the above named E. F. and G. H., witnesses, whose names are subscribed to the foregoing deposition, were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions by them respectively subscribed were reduced to writing by me, and were [*written and*] by said witnesses respectively subscribed in my presence, and were taken at the time and place specified in the notice hereto attached; [*if there was an adjournment say:*] and the taking of said depositions was commenced on the day of, 18..., and was continued from day to day, as provided in the notice hereto attached, until the day of, 18..., when the taking of said depositions was closed.

¹ This form of certificate was held sufficient in *Jameson v. Butler*, 1 Neb., 117.

Witness my hand and notarial seal this day of, 18...

N. O., *Notary Public.*

If there is an adjournment it should be stated in the deposition thus:

Being unable to complete the taking of the depositions in this case by reason of [*state the cause*], I therefore adjourn the further taking thereof until to-morrow at ... o'clock A.M., at this place, at which time and place I will proceed with the taking of the same.

N. O., *Notary Public.*

On the next day he will make an entry somewhat in this form:

Pursuant to the above adjournment I, on this day of, 18..., at ... o'clock A.M., continued the taking of said deposition as follows: I. J., called as witness on behalf of the plaintiff, being by me first duly sworn, etc.

When the place of taking the deposition is out of the state or more than fifty miles from the place of trial of the action, the adverse party, within forty-eight hours after the service of the notice, may serve upon the party taking the deposition, his agent, or attorney of record, written cross interrogatories to be propounded to any witness, and such last named party shall cause them to be transmitted to the officer before whom the deposition is taken, who shall propound them to the witness, and they shall be answered, subject to objections as in other cases. Laws of 1875, page 37.

NO. 683.

Cross Interrogatories.

[Title of Cause.]

The following cross interrogatories are to be propounded to the witness E. F. by the officer taking his deposition in this case:

Cross interrogatory. 1. Are you directly or indirectly interested in the result of this action?

Answer.

2. [*Proceed as above, with each question to be propounded.*]

No. 684.

Indorsement of Officer Taking Deposition.

A. B. }
 ^v
 C. D. }

In the district court of county, Nebraska.

Depositions in said action sealed up, addressed, and transmitted by me. N. O., *Notary Public*.

To K. L., *Clerk of the District Court of [Gage] County, [Beatrice], Nebraska.*

No. 685.

Exceptions to Depositions.

[Title of Cause.]

The defendant excepts to the reading of the deposition of E. F. on the trial of this action, for the following reasons:

1. Because the certificate of the notary is defective in this: that it does not show that the deposition was written and subscribed in the presence of the officer certifying thereto.

2. That it does not appear that the witness G. H. was first sworn to testify the truth, the whole truth, and nothing but the truth.

3. [*State any other cause.*]

C. D.,

By S. H., *his Attorney.*

The exceptions must be filed before the commencement of the trial.

No. 686.

Exceptions Overruled.

This cause came on for hearing upon the exceptions of the defendant to the deposition of E. F., taken in this action, and was submitted to the court thereon, on consideration whereof the court finds* they are not well taken, and the same are overruled¹ [*to which the defendant excepts*].

No. 687.

Exceptions Sustained.

Follow the preceding form to the *, then say: that said exceptions are properly taken.

¹ Although the court may commit an error in refusing to suppress a deposition, yet if the moving party fail to object to its being read to the jury at the trial he cannot complain of such error in the appellate court. *Starring v. Mason*, 4 Neb., 367.

It is therefore ordered that said exceptions be sustained, and said deposition stricken from the files [to which order of the court the plaintiff excepts].

COMMISSION TO TAKE DEPOSITIONS.

Any court of record of this state, or any judge thereof, is authorized to grant a commission to take depositions within or without the state. There is no provision in the statute for giving the adverse party notice of the application, but the court or judge has a right to require such notice to be given, and should do so in all cases.

No. 688.

Notice of Application.

You are hereby notified that on the day of, 18..., at ... o'clock ... M., the [plaintiff] will apply to the district court of county [or, judge thereof], at the court room in said county, to grant a commission in this action directed to for the examination on oath of E. F. as a witness herein on behalf of the plaintiff.

A. B., plaintiff,
By S. J., his Attorney.

No. 689.

Motion for a Commission to Take Testimony.

The plaintiff moves the court [or, judge of said court] to grant a commission to, in the county of and state of, for the examination on oath of E. F. as a witness on behalf of the plaintiff in this action.

A. B., plaintiff,
By S. J., his Attorney.

No. 690.

Order for Commission to Take Depositions.

This cause came on for hearing upon the motion of the [plaintiff] for the granting of a commission to take the deposition of one E. F., and it appearing that notice of such application had been served upon the defendant on the day of, 18..., it is therefore ordered that a commission be granted to issue to, of the county of, and state of, authorizing

and requiring him to examine, upon oath, one E. F. upon the written interrogatories heretofore filed, and return the same into this court without delay.

No. 691.

Interrogatories.

[Title of the Cause.]

Interrogatories to be propounded to E. F., in pursuance of the commission issued herein:

Int. 1. State your name, age, occupation, and place of residence.

Int. 2. State, etc.

Cross-interrogatories.

Cross-int. 1.

Cross-int. 2.

No. 692.

Commission to Take Depositions.

THE STATE OF NEBRASKA, COUNTY.

To

Know ye that the district court of county, Nebraska, does hereby authorize, empower, and commission you to examine, on oath, one E. F. upon the interrogatories hereto attached, and reduce said examination to writing, and cause the same to be subscribed by said witness in your presence, and to certify, seal up, and forward the same to the clerk of this court without unnecessary delay.

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 18...

[L. s.]

K. L., Clerk of the District Court.

No. 693.

Certificate of Depositions Taken on Commission.

THE STATE OF, COUNTY..

I,, do hereby certify that, in pursuance of the commission hereto annexed and to me directed, I caused said E. F. to come before me on the day of, 18..., at, who was then and there by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, and then examined upon the interrogatories attached to said writ, and said examination was reduced to writing by me, and was by

said witness subscribed in my presence, which examination and all of the same is now herewith returned.

In witness whereof I have hereunto set my hand and official seal, this day of, 18...

[L.S.]

[Signature of Commissioner.]

The deposition must be sealed up, indorsed, and directed to the clerk of the court.

CHAPTER XXXI.

EXEMPTIONS AND HOMESTEADS.

*No property hereinafter mentioned is liable to attachment, execution, or sale on any civil process issued from any court in this state against any person being a resident of the state and the head of a family:*¹

First. The family bible.

Second. Family pictures, school books, and library for the use of the family.

Third. A seat or pew in any house or place of public worship.

Fourth. A lot in any burial ground.

Fifth. All necessary wearing apparel for the debtor and his family; all beds, bedsteads, and bedding necessary for the use of such family; all stoves and appendages put up or kept for the use of the debtor or his family, not to exceed four; all cooking utensils, and all other household furniture not herein enumerated, to be selected by the debtor, not exceeding in value one hundred dollars.

Sixth. One cow, three hogs, and all pigs under six months old; and if the debtor be at the time actually engaged in the business of agriculture, in addition to the above one yoke of oxen, or a pair of horses in lieu thereof;² ten sheep and the wool

¹ Code, § 530.

² See *The State v. Cunningham*, 6 Neb., 90.

therefrom, either in the raw material or manufactured into yarn or cloth; the necessary food for the stock mentioned in this section for the period of three months; one wagon, cart, or dray; two plows and one drag; the necessary gearing for the team herein exempted, and other farming implements, not exceeding fifty dollars in value.

Seventh. The provisions for the debtor and his family necessary for six months' support, either provided or growing, or both, and fuel necessary for six months.

Eighth. The tools and instruments of any mechanic, miner, or other person used and kept for the purpose of carrying on his trade or business. The library and implements of any professional man.

All of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk, or legal representative.

In addition to the above, all heads of families who have neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state, shall have exempt from forced sale on execution the sum of \$500 in personal property.¹

I have in another work given forms of procedure for claiming personal property exempt from execution, and will not repeat them here.

No property is exempt where the debt was incurred for clerks', laborers', or mechanics' wages, or for money due and owing by an attorney at law for money or other valuable consideration received by the attorney from any person or persons.

HOMESTEADS.

A homestead not exceeding in value \$2,000, consisting of the dwelling-house in which the claimant resides and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village; or instead thereof, at the option of the claimant, a quantity of contiguous land, not exceed-

¹ In *Axtell v. Warden*, 7 Neb., 182, it was held that where a party had entered a homestead under the laws of the United States, and was in possession thereof as a homestead, he was not entitled to \$500 under this provision.

ing two lots, within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale,¹ except for mechanics', laborers', or vendors' liens upon the premises, or for debts secured by mortgage upon the premises, executed and acknowledged by both husband and wife, or an unmarried claimant.

When an execution for the enforcement of a judgment obtained in a case within the above exceptions is levied upon the lands or tenements of the head of a family, such head of a family may notify the officer at the time of making the levy of what he regards as his homestead, with a description thereof, within the limits above prescribed, and the remainder alone shall be subject to such levy, except as hereafter stated.

The judgment creditor may thereupon apply to the district court in the county in which the homestead is situated for the appointment of persons to appraise the value thereof.

The application must be made upon a verified petition, showing—

First. The fact that an execution has been levied upon property which has been claimed as a homestead.

Second. The name of the claimant.

Third. That the value of the homestead exceeds the amount of the homestead exemption.

No. 694.

Petition of Judgment Creditor.

1. Your petitioner respectfully represents to the court that at the, 18..., term of the district court of county he recovered a judgment against C. D. for the sum of \$....., which is still wholly unpaid.

2. An execution was issued out of said court upon said judgment, which on the day of, 18..., was levied upon the following described premises, to-wit: [*describe premises*], which are claimed as a homestead by the defendant C. D.

3. Said premises consist of acres, of which acres are in cultivation and [*describe the condition of the premises and the*

¹ Laws of 1879, 57-8.

buildings thereon], and that the value thereof exceeds the sum of \$2,000.

Your petitioner therefore prays for the appointment of three disinterested residents of said county to appraise the value of said homestead.

[*Verification.*]

The petition must be filed with the clerk of the district court, and a copy thereof, with a notice of the time and place of hearing, must be served upon the claimant at least ten days before the hearing.

No. 695.

Notice.

To C. D.:

You are hereby notified that a hearing will be had before the district court of county, at the court-house in said county, on the day of, 18..., at ... o'clock ... M., upon the petition, a copy of which is hereto attached, asking for the appointment of three disinterested residents of county to appraise the value of the premises described in the petition claimed by you as a homestead.

A. B.,

By S. J., *his Attorney.*

No. 696.

Order Appointing Appraisers.

This cause came on for hearing upon the petition of the plaintiff for the appointment of appraisers, and the evidence, and was submitted to the court, and upon proof being made of the service of said petition and notice as required by law, and of the facts stated in said petition, it is hereby ordered that E. F., G. H., and I. J., three disinterested residents of county, be and they hereby are appointed to appraise the value of said homestead, upon taking the oath required by law.

No. 697.

Oath of Appraisers.

We, E. F., G. H., and I. J., three disinterested residents of county, do solemnly swear that we will impartially appraise the value of the following described lands, with the appurtenances thereon, to-wit: [*describe lands*], claimed by C. D. as a homestead.

No. 698.

Report of Appraisers.

The undersigned, appraisers duly appointed to appraise the [describe the premises], claimed as a homestead by C. D., having taken the oath required by law, did, on the day of, 18..., upon actual view of the premises, appraise the value of the same at the sum of \$2,500, and we find that said premises can be divided without material injury.

E. F.

G. H.

I. J.

No. 699.

Order to Appraisers to Set-off Homestead.

It appearing from the report of the appraisers in this case that the premises claimed as a homestead by C. D. are of the value of \$2,500, and can be divided without material injury, it is therefore ordered that said appraisers set-off to said C. D., as a homestead, so much of said land, including the residence, not exceeding one hundred and sixty acres, as will amount in value to \$2,000, and that the execution may be enforced against the remainder of said land.

The report of the appraisers setting off the homestead should establish the boundaries by metes and bounds. See Report of Referees in Partition.

The phrase "head of a family," as used in this chapter, includes within its meaning—

1. The husband, when the claimant is a married person.
2. Every person who has residing on the premises with him or her, and under his care and maintenance either—
 1. His or her minor child, or the minor child of his or her deceased wife or husband.
 2. A minor brother or sister, or the minor child of a deceased brother or sister.
 3. A father, mother, grandfather, or grandmother.
 4. The father or mother, grandfather, or grandmother of a deceased husband or wife.
5. An unmarried sister, or any other relatives mentioned in this section who have obtained the age of majority and are unable to take care of or support themselves.¹

¹ Laws of 1879, pp. 60, 61.

An equitable owner of real estate may occupy and hold the same as his homestead, subject to all the rights, privileges, immunities, and disabilities given and imposed by the homestead exemption laws. *Moore v. Reaves*, 15 Kan., 150. *Tarrant v. Swain*, Id., 146.

A mere temporary absence from the homestead for several months, during which time it was in possession of a tenant, will not work an abandonment of the homestead. But the rule is different if there is a clear and actual abandonment of the premises.

As a general rule a homestead becomes such when it is used and occupied as a home, and not before, and mere intention to use the premises as a homestead is not sufficient.

CHAPTER XXXII.

STAY OF EXECUTION.

The order of sale on all decrees for the sale of mortgaged premises shall be stayed for the period of nine months from and after the rendition of such decree, whenever the defendant shall, within twenty days after the rendition of such decree, file with the clerk of the court a written request for the same; provided that if the defendant make no such request within said twenty days the order of sale may issue immediately after the expiration thereof.

On all judgments for the recovery of money only, except those rendered in any court on appeal or writ of error thereto, or against any officer, or person, or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be a stay of execution if the defendant therein shall, within twenty days from the rendition of judgment, procure two or more sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs, from the time of rendering judgment until paid, as follows:

First. If the sum for which judgment was rendered, exclusive of costs, does not exceed fifty dollars, three months.

Second. If the sum for which judgment was rendered, exclusive of costs, exceeds fifty dollars, and does not exceed one hundred dollars, six months.

Third. If the sum for which judgment was rendered, exclusive of costs, exceeds one hundred dollars, nine months.

Officers approving stay bonds shall require the affidavits of the signers of such bonds that they own real estate not exempt from execution, and aside from incumbrance, to the value of twice the amount of the judgment.

No proceedings in error or appeal shall be allowed after such stay has been taken, nor shall a stay be taken on a judgment entered as herein contemplated against one who is a surety in the stay of execution.

The sureties for the stay of execution may be taken and approved by the clerk, and the bond shall be recorded in a book kept for that purpose, and have the force and effect of a judgment confessed from the date thereof against the property of the sureties, and the clerk shall enter and index the same in the proper judgment docket, as in the case of other judgments.

When the surety is entered after execution is issued the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution with his doings thereon.

All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer upon stay of execution being entered.

At the expiration of the stay the clerk shall issue a joint execution against the property of all the judgment debtors and sureties, describing them as debtors or sureties therein.

When a stay of execution has been taken such confessed judgment shall not release any judgment lien by virtue of the original judgment for the amount then due.

The officer holding the execution shall return thereon what amount was made from the principal debtor, and how much from the sureties.¹

¹ Laws of 1875, 49-51.

No. 700.

Request for Stay of Order of Sale in Case of Foreclosure of Mortgage.

[Title of Cause.]

The defendant C. D. requests a stay of the order of sale in this case for nine months from the date of the rendition of the decree.

C. D.

The request must be filed with the clerk of the court within twenty days from the time the decree is rendered.

No. 701.

Bond for Stay of Execution.

[Title of Cause.]

Whereas, on the day of, 18..., A. B. recovered a judgment against C. D. in the district court of county for the sum of \$....., and \$..... costs of suit;

Now therefore, in consideration of stay of execution for nine months from the time of the rendition of said judgment we hereby acknowledge ourselves security for said defendant for the payment of said judgment, interest, and costs, from the time of rendering the same until paid.¹

E. F.

G. H.

I hereby approve the foregoing bond and the sureties thereon this day of, 18...

K. L., *Clerk of the District Court.*

No. 702.

Affidavit of Surety.

[Venue.]

E. F., being first duly sworn, deposes and says that he is a resident of, and owns real estate in county, in this state, not exempt from execution, and aside from incumbrances, to the value of \$.....

E. F.

Subscribed, etc.

¹ The above condition is in substance in the language of the statute, and it seems to be sufficient. The statute provides for a *bond*, but makes no provision as to the amount of the *penalty*. The act seems to be copied substantially from the laws of Iowa, and Judge Miller, in his work on pleading and practice, for a form of a bond in a similar case gives the form of an undertaking. See Miller's Pleading and Practice (Revised ed.), 478.

Each surety must make a separate affidavit.

The statute does seem to require the principal to sign the obligation.

CHAPTER XXXIII.

EXECUTIONS.

Execution in practice is putting the sentence of the law in force. The carrying into effect the final judgment or decree of a court. 3 Blackstone Com., 412. 1 Bouv. Law Dict., 554.

Executions shall be deemed process of the court, and shall be issued by the clerk and directed to the sheriff of the county. They may be directed to different counties at the same time. Code, § 474.

Section 475. Executions are of three kinds:

First. Against the property of the judgment debtor.

Second. Against his person.

Third. For the delivery of the possession of real property, with damages for withholding the same.

Section 476. Lands, tenements, goods, and chattels not exempt by law shall be subject to the payment of debts, and shall be liable to be taken on execution and sold, as hereinafter provided.

Section 477. The lands and tenements of the debtor within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered; but judgments by *confession* and judgments rendered at the *same term* at which the *action is commenced* shall bind such lands only from the day on which such judgments are rendered.

All other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution.

Section 483. The writ of execution against the property of the judgment debtor, issuing from any court of record of this state, shall command the officer to whom it is directed that of

the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels he cause the same to be made of the lands and tenements of the debtor; and the exact amount of the debt, damages, and costs for which judgment is entered *shall be endorsed on the execution.*

Section 485. The officer to whom a writ of execution is delivered shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found the officer shall indorse on the writ of execution "No goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor which may be liable to satisfy the judgment.

What may be levied upon and sold. Growing crops raised annually by cultivation, like a crop of corn or wheat, is a chattel, and may be levied upon and sold under an execution.

The interest of a tenant in rented lands or buildings may be levied upon and sold unless such premises are exempt under the homestead law.

Not subject to levy and sale, what. Growing trees and the spontaneous productions of the soil constitute a part of the realty, and are not subject to levy and sale separate from the land.

A mere equitable interest in goods, such as the contingent interest of an assignor in goods after an assignment to an assignee for the benefit of creditors, cannot be levied upon and sold on execution.

The goods of a deceased person cannot be levied upon and sold for the debt of the *executor or administrator.*

Goods held by a party by virtue of a mere lien, such as a common carrier or pawnee, cannot be levied upon and sold by virtue of an execution against such *carrier or pawnee.*

And where goods are held subject to a lien upon them, as for work done on them, they cannot be levied upon and sold on an execution against the owner of the same without paying the amount of the lien.

As a general rule property in the custody of the law is not subject to levy and sale. *But money belonging to the judgment debtor, that can be taken on an execution without force or violence, may be levied upon and at once credited on the execution.*

A railroad car or stage coach may be levied upon and sold.

What constitutes a levy. To constitute a valid levy the officer should take possession of the goods. If the property levied upon is of such a character that actual possession of it cannot be had, as growing crops and the like, the officer should go upon the land and assert his right to the property by virtue of the execution. The property must be in actual view and subject to his control at the time the levy is made.

When the sole plaintiff or defendant to an action dies after judgment has been recovered no execution can be issued thereon until the action is revived.

But when an execution has been issued and a levy actually made before the decease of either party, the property levied upon may be sold in the same manner as though the parties were alive. And where there are several *plaintiffs* in a judgment, and one of them dies before an execution has been issued, an execution may still issue in the name of all the plaintiffs.

The officer must use his judgment as to the probable value of the goods levied upon, and should levy upon a sufficient amount to satisfy the execution and costs.

If, however, there is a gross abuse of discretion, showing that he intended to oppress the debtor, he will be liable to him in damages.

The sheriff may leave the goods levied upon in the possession of the judgment debtor a reasonable time without impairing the levy, but by doing so he makes himself responsible to the judgment creditor for their safe keeping.

The mode of procedure in case of the trial of the right of property, where the goods are claimed by a third party, does not properly belong to a work of this kind. The remedy, if such it may be called, is a very unsatisfactory one, and should not be resorted to except in an emergency.

NO. 703.

Form of Execution for Money.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, on the day of, 18..., A. B. recovered a

judgment against C. D. in the district court of county, for the sum of \$....., and also the further sum of \$..... costs of suit, which said sums of money are still due and unpaid;

You are therefore commanded that of the goods and chattels of said C. D. in your county you cause to be made said sum of \$..... [*aggregate*] and accruing costs; and for want of goods and chattels you cause the same to be made of the lands and tenements of said C. D. in your county, and have said moneys in said court in sixty days from the date hereof, to render the same unto the said A. B. You will make due return of this writ, with your doings thereon, on or before the day of, 18....

Witness my hand and the seal of said court, this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

The exact amount of the debt, damages, and costs for which judgment is entered must be indorsed on the writ.

No. 704.

Indorsement on Execution.

Amount of judgment	\$.....
Judgment creditor's costs.....	\$.....
Judgment debtor's costs.....	\$.....
Interest	\$.....
Accruing costs [<i>items</i>]	\$.....

K. L., *Clerk.*

No. 705.

Against Principal and Surety.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, on the day of, 18..., A. B. recovered a judgment against C. D. as principal, and E. F. as surety, in the district court of county, for the sum of \$....., and also the further sum of \$..... costs of suit, which said sums of money are still due and unpaid;

You are therefore commanded that of the goods and chattels of said C. D. in your county you cause to be made said sum of \$..... and accruing costs; and for want of goods and chattels of said C. D. you cause the same to be made of his lands and ten-

ements in your county; and for want of goods and chattels, lands and tenements of said C. D., you cause the same to be made of the goods and chattels, and, for want thereof, of the lands and tenements of said E. F. in your county, and have said moneys in said court in sixty days from the date hereof, to render the same unto the said A. B. You will make due return of this writ, with your doings thereon, on or before the day of, 18...

Witness my hand and the seal of said court, this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

No. 706.

Notice of Sale of Goods.

Notice is hereby given that by virtue of an execution issued by the district court of county, in favor of A. B. and against C. D., and to me directed, I will, at ... o'clock ... M., on the day of, 18..., at the house of, in precinct, in said county, offer for sale at public auction the following goods and chattels, to-wit: [*copy inventory of property*], taken as the property of C. D. on said execution.

G. H., *Sheriff.*

Dated this day of, 18...

No. 707.

Return on Execution. No Goods.

January 1, 18..., 10 o'clock A.M. Received this writ. After diligent search I am unable to find any goods or chattels, lands or tenements of said C. D. in my county.

No. 708.

Levy and Sale of Personal Goods and Chattels.

January 1, 18..., at 10 o'clock A.M., received this writ, and on the same day I levied the same upon the following goods and chattels of said C. D., to-wit: [*describe the property*]; and afterwards, on the day of, 18..., at the residence of, in precinct, in said county, having first given notice of the time and place of said sale for more than ten days prior thereto, by advertisement published in the weekly *Gazette*, a newspaper

printed in county, I offered said goods and chattels for sale at public vendue, and sold the same,* as follows:

To S. H., 200 bushels of corn	\$ 40 00
To I. K., 400 bushels of wheat.....	300 00

Proceeds of sale	\$340 00
------------------------	----------

Costs [*give items*].

G. H., *Sheriff*.

NO. 709.

Return on Sale of Real Estate.

January 1, 18..., 10 A.M. Received this writ, and, after diligent search, being unable to find any goods and chattels of said C. D. in my county, I endorsed on said writ "No goods," and forthwith levied said execution on the following described real estate of said C. D., to-wit: [*describe it*]; and thereupon I called an inquest of two disinterested freeholders, residents of county, and administered to them an oath impartially to appraise the interest of said C. D. in said real estate at its real value in money; and thereupon, on the day of, 18..., I, together with said freeholders, appraised the interest of said C. D. in said real estate at the sum of \$....., and reduced said appraisement to writing, which was duly signed, and a copy thereof, together with my application to the county clerk, the clerk of the district court, and county treasurer of county, for the purpose of ascertaining the amount of the liens and incumbrances upon said real estate, and their official certificates in reply thereto, were forthwith deposited in the office of the clerk of the district court of county; and thereupon, commencing on the day of, 18..., I caused a notice to be published five consecutive weeks in the weekly *Gazette*, a newspaper printed in said county, that on the day of, 18..., at ... o'clock ... M., at the door of the court-house, in county [*the place where the last term of the district court was held*], I would offer said lands for sale; and at the time and place stated in said notice, and after said notice had been published more than thirty days, I offered said premises for sale at public auction, in tracts of acres each, and sold the same as follows;

To L. M., [description] for the sum of\$.....
 To N. O., [description] for the sum of\$.....
 each of said persons being the highest bidder for the aforesaid
 descriptions of said real estate, and the sums bid and paid being
 more than two-thirds of the appraised value of the same.

G. H., Sheriff.

Dated this day of, 18...

No. 710.

*Application of Sheriff to County Clerk, the Clerk of the District Court, or County
 Treasurer for Statement of Liens.¹*

You are hereby required to certify, under your hand and official seal, the amount and character of all liens existing against the following described lands and tenements, to-wit: [describe], on the day of, 18..., as they appear of record in your office.

G. H., Sheriff.

Dated this day of, 18...

No. 711.

Certificate of County Clerk, Etc.¹

The following liens appear of record in this office against the [describe the property, as in application], to-wit:

[Set out each lien or incumbrance by itself, stating the principal and interest separately, etc.]

THE STATE OF NEBRASKA, COUNTY.

I, A. B., county clerk of county, hereby certify that I have correctly stated above the amount and character of all liens existing against the above described lands and tenements, and also all incumbrances thereon which appear of record in my office, on the day of, 18...

In witness whereof I have hereunto set my hand and affixed my official seal this day of, 18...

[L. S.]

A. B., County Clerk.

No. 712.

Appraisement.²

We, E. F. and L. M., two disinterested freeholders and residents of county, were by the sheriff of said county called on an inquest to appraise the interest of C. D. in the following

¹ Laws of 1875, page 61.

² See *Sessions v. Irvin*, 8 Neb., 5.

lands and tenements, to-wit: [*describe premises*], levied upon by said sheriff as the property of C. D. on an execution in favor of A. B. and against C. D., and having taken the oath required by law, do with said sheriff appraise the same as follows:

Gross value of said lands and tenements.....	\$.....
Taxes as per county treasurer's certificate.....	\$.....
Mechanics' lien as per county clerk's certificate.....	\$.....
Judgments as per clerk of district court's certificate.....	\$.....

Total liens and incumbrances.....\$.....

which, deducted from the gross value of said real estate, leaves \$....., which we appraise as the real value in money of the interest of said C. D. in said lands and tenements.

Dated this day of, 18...

E. F.

L. M.

G. H., *Sheriff*.

No. 713.

Order of Sale.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, in an action then pending in the district court of county, wherein A. B. was plaintiff and C. D. defendant, for the foreclosure of a mortgage upon the real estate hereinafter described, the plaintiff, on the day of, 18..., obtained a decree for the sum of \$....., and \$..... costs of suit, and that said mortgaged premises to be sold to satisfy the same, which decree is still in full force and unsatisfied.

You are therefore commanded to cause the following lands and tenements, to-wit: [*describe as in decree*], to be appraised, advertised, and sold as upon execution to satisfy said sum of \$....., and \$..... costs, the amount due on said decree, and also accruing costs, and have said moneys in said court in sixty days from the date hereof, with a return of your doings hereon.¹

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 18...

[L. S.]

K. L., *Clerk of the District Court.*

¹ The decree of the court operates directly upon the mortgaged property; no writ or other process of the court is resorted to to bring it within its jurisdiction. *Rector v. Rotton*, 3 Neb., 177.

Where there are several sums found due to different persons the order should state the amount due to each, and the priorities, as in the *decrec*. The sale should be for the entire amount due, so that the purchaser may take a perfect title by the sale. See *Tootle v. White*, 4 Neb., 401.

The return will be the same in substance as on a sale of real estate upon execution, omitting the portion in regard to a *levy*.

NO. 714.

Motion to Set Aside a Sale of Real Estate.

The defendant C. D. moves the court to set aside the sale in this cause for the following reasons:

1. Because it does not appear that the persons called by the sheriff to appraise said real estate were residents of county.¹

2. Said premises consisted of two city lots, but were appraised and sold together as one piece of property.²

3. The first publication of the notice of said sale was made on the day of, 18..., being less than thirty days prior to the day of sale.

4. Said premises were sold to one L. K. for the sum of \$....., but who refused to pay the amount of said bid until confirmation of the sale, and thereupon the sheriff, after said sale had closed, and after the bidders had departed, again offered said premises for sale, and sold the same to the plaintiff in the execution for the sum of \$.....³

S. H., *Attorney for the Defendant.*

If the grounds assigned in the motion do not appear in the record the moving party must prove the same by affidavits or other evidence, and the adverse party will be permitted to introduce affidavits or other evidence to sustain the sale.

The court should see to it that the sale has been fairly conducted in all respects. As was said in *Paulett v. Peabody*, 3 Neb., 197: "A very large discretion is necessarily given to the district court in the supervision of sales of real property under its judgments

¹ See *Laughlin v. Schuyler*, 1 Neb., 409.

² Id. But see *Eaton v. Ryan*, 5 Id., 47.

³ *Jones v. Null*, 9 Neb., 254.

and decrees. The statute, it is true, points out very clearly certain steps which must be taken by the officer charged with the duty of making the sale, not one of which can be omitted, and in respect to which the court has no discretion. But this enumeration of duties on the part of the sheriff is not to be considered a limitation or restriction upon the authority of the court to see to it that in all other respects the proceedings are properly conducted and the sale fairly made, so that neither the parties to the suit nor the purchaser at the sale shall be defrauded. In this the court must exercise a wise discretion.

No. 715.

Order Setting Aside Sale.

This cause came on for hearing on the motion of the defendant to set aside the sale made in this cause on the day of, 18..., and was submitted to the court, on consideration whereof said motion is sustained, and said sale is hereby set aside and vacated at the costs of

No. 716.

Order Overruling Motion.

This cause came on for hearing on the motion of the defendant to set aside the sale made in this cause on the day of, 18..., and was submitted to the court, on consideration whereof said motion is overruled at defendant's costs.

No. 717.

Confirmation and Order for Deed.

This cause came on for hearing upon the return of the sheriff to the execution [*or order of sale*¹] issued herein, together with his report of the proceedings and sale of said lands and tenements under said execution, and the court, after having carefully examined said proceedings, and being satisfied that said sale has in all respects been made in conformity with law, and of the legality of said sale, it is hereby ordered that said sale and proceedings be and the same hereby are confirmed, and the

¹ Section 452 of the code provides that sales of specific real property shall conform in all respects to the laws regulating sales of land upon execution.

sheriff of said county is hereby ordered to make to the purchaser a deed in fee simple for the lands and tenements so sold.¹

No. 718.

Order for Succeeding Sheriff to Make Deed.

It satisfactorily appearing to the court that the term of office of, the then sheriff of county, has expired without having executed a deed to the purchaser of the lands and tenements herein sold,

It is therefore ordered that, the present sheriff, execute to said purchaser a deed in fee simple for said premises.

No. 719.

Sheriff's Deed.

Know all men by these presents that, whereas, at a term of the district court of county, held on the day of, 18..., A. B. recovered a judgment against C. D. for the sum of \$....., and \$..... costs of suit, and afterwards, on the day of, 18..., caused an execution to issue out of said court on said judgment for the amount of said judgment, interest, and costs, which, for want of goods and chattels belonging to said C. D. whereon to levy, was, on the day of, 18..., duly levied by the sheriff of said county upon the lands and tenements hereinafter described as the property of said C. D.; that after the due appraisement of said property, and after having given notice of the time and place of said sale by advertisement, as required by law, for more than thirty days prior thereto, said sheriff, at the time and place mentioned in said advertisement, offered said lands and tenements for sale at public auction, and sold the same to for the sum of \$....., he being the highest bidder therefor. Said sale was thereupon reported to said court, and on the day of, 18..., was by said court carefully examined and duly confirmed, and the sheriff of said county was thereupon ordered to make to said, the purchaser, a deed in fee simple for said lands and tenements.

Now therefore, in consideration of the premises and of the

¹ In case of sale under a decree of foreclosure, if the decree fails to find the priority of liens and direct the mode of payment, an order should be entered on confirmation declaring the priorities and directing the distribution of the proceeds.

sum of \$....., so bid and paid as aforesaid, I,; sheriff of county, do hereby grant and convey unto the said, his heirs and assigns forever, the lands and tenements so as aforesaid sold, to-wit: [*describe premises*], to have and to hold said real estate, with all the appurtenances thereto belonging, to the said, his heirs and assigns forever.

In witness whereof I have hereunto set my hand this day of, 18...

....., *Sheriff of County.*

In presence of

C. G.

THE STATE OF NEBRASKA, COUNTY.

On this day of, 18..., before the undersigned, a justice of the peace in and for said county, personally appeared, sheriff of county, Nebraska, to me personally known to be the identical person whose name is subscribed to the foregoing deed as grantor, and acknowledged the execution thereof to be his voluntary act and deed as said sheriff for the purposes therein expressed.

Witness my hand the day and year above written.

C. G., *Justice of the Peace.*

No. 720.

Vendi.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

Whereas, by an execution issued out of this court on the day of, 18..., on a judgment rendered therein on the day of, 18..., in favor of A. B. and against C. D., for the sum of \$....., you were commanded that of the goods and chattels of said C. D. you cause to be made said sum of money, with interest and accruing costs, and for want of goods and chattels you cause the same to be made of his lands and tenements, and that you have said moneys in court in sixty days from the date of said writ, with a return of your doings thereon; and whereas you have made return that by virtue of said execution you have taken in execution [*certain goods*], an inventory of which has been returned, which remain unsold for want of bidders;

You are therefore commanded to cause said [*goods and chattels*] to be advertised and sold according to law to satisfy said execution, with interest and costs, and have said money in court in sixty days from this date. [*If an additional levy is required add*] You are further commanded, if the property remaining in your hands is in your opinion insufficient to satisfy said judgment, to levy the same further upon the goods and chattels, and for want thereof of the lands and tenements of said C. D., sufficient to satisfy said judgment and costs [*conclude as in an execution.*]

Witness my hand and the seal of said court this day of, 18...

[L. S.]

K. L., *Clerk of the District Court.*

No. 721.

Amercement of Clerk for Neglect.

This cause came on for hearing on the motion of the [*plaintiff*] for the amercement of the clerk of this court, and was submitted to the court after due notice to said clerk, on consideration whereof the court finds that said clerk refused, upon demand of the plaintiff, to pay to him the sum of \$..... received by said clerk in his official capacity for the use of said plaintiff. It is therefore ordered that said, clerk as aforesaid, be amerced for said refusal in the sum of \$....., the amount of said debt, damages, and costs, and ten per centum thereon, and that the plaintiff recover the same, with his costs.¹

No. 722.

Amercement of Sheriff.

This cause came on for hearing on the motion of the [*plaintiff*] for the amercement of, sheriff of county, and was submitted to the court after due notice to said sheriff, on consideration whereof the court finds that said sheriff has neglected to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution in this action on a judgment in favor of A. B. and against C. D., for the sum of \$....., and that his return to said execution shows that he has not

¹ The proceeding is instituted by a motion in court after two days' notice. See Code, § 513. *Armstrong v. Grant*, 7 Kans., 285. See also *Smith v. Martin*, 20 Id., 575.

levied and made the amount of said judgment, damages, and costs, and that there is still due on said judgment the sum of \$..... It is therefore ordered, etc.

The order has the force and effect of a judgment.

CHAPTER XXXIV.

PROCEEDINGS IN AID OF EXECUTION.

Where a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any interest which he may have in any banking, turnpike, bridge, or other joint stock company, or any interest he may have in any money, contracts, claims, or choses in action due or to become due to him, or in any judgment or decree, or any money, goods, or effects which he may have in possession of any person, body politic or corporate, shall be subject to the payment of such judgment by proceedings in equity, or as in this chapter provided. Code, § 532.

Judgment debtor to appear and answer, when. When an execution against the property of a judgment debtor, or one of several debtors in the same judgment, is issued to the sheriff of a county where he resides, or, if he do not reside in the state, to the sheriff of the county where the judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from a probate [county] judge, or a judge of the district court of the county in which the execution was issued, requiring such debtor to appear and answer concerning his property before such judge, or referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued. § 533.

No. 723.

Order for Examination Under Section 533.

It appearing to me from the sheriff's return, and also from the affidavit of, that an execution, issued on a judgment re-

covered in the court of county, in favor of A. B. and against C. D., has been returned wholly unsatisfied, and that there is now due thereon the sum of \$....., it is therefore ordered that C. D. appear before me at my office at on the day of, 18..., to answer concerning his property.

A copy of the order must be served on the debtor.

After the issuing of an execution against property, and upon proof by affidavit of the judgment creditor, or otherwise, to the satisfaction of the district court, or a judge thereof, or a probate judge of the county in which the order may be served, that the judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a time and place in said county to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are prescribed in this chapter. § 534.

Debtor may be arrested, when. Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the judge may, upon proof to his satisfaction, by affidavit of the party or otherwise, that there is danger of the creditor leaving the state or concealing himself to avoid the examination herein mentioned, issue a warrant requiring the sheriff to arrest him and bring him before such judge within the county in which the debtor may be arrested. Such warrant can be issued only by a probate judge, or a judge of the district court of the county in which the debtor resides or may be arrested. Upon being brought before the judge he shall be examined on oath, and other witnesses may be examined on either side; and if on such examination it appear that there is danger of the debtor leaving the state, and that he has property which he unjustly refuses to apply to such judgment, he may be ordered to enter into an undertaking, in such sum as the judge may prescribe, with one or more sureties, that he will from time to time attend for examination before the judge or referee, as shall be directed. In default of entering into such

undertaking he may be committed to the jail of the county by warrant of the judge as for a contempt. § 535.

No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of a fraud, but his answer shall not be used as evidence against him in a prosecution for such fraud. § 536.

Before a creditor can avail himself of this remedy he must have recovered a judgment upon his claim, and an execution issued thereon must have been returned unsatisfied in whole or in part, in all cases except under the provisions of sections 534-5.

No. 724.

Affidavit for Examination of Judgment Debtor, where an Execution has been Returned Unsatisfied.

A. B., plaintiff in the above entitled action, being first duly sworn, deposes and says that on the day of, 18..., he recovered a judgment against C. D. for the sum of \$....., and \$..... costs, in the district court of county, and that on the day of, 18..., an execution was duly issued thereon against the property of said C. D. in county, which has been returned by the sheriff of said county wholly unsatisfied [*state the facts*]. Affiant further states that said C. D. is a resident of said county,¹ and has property which he unjustly refuses to apply upon said judgment, as follows: [*thus: that said C. D. lately possessed a stock of goods at his store in the town of, and has removed a large portion thereof and concealed the same*], and refuses to apply any portion thereof to the payment of said judgment.

A. B.

Subscribed, etc.

No. 725.

Order for Defendant to Appear and Answer.

On the day of, 18..., came the plaintiff, and thereupon said application came on for hearing, and it appearing to the court that said plaintiff obtained a judgment against the de-

¹ The county where the debtor resides, or, if he do not reside in the state, where the judgment was rendered or a transcript filed.

fendant, upon which an execution against his property was duly issued to the sheriff of county, and was returned wholly unsatisfied, and that said C. D. has property, goods, and chattels which he conceals,

It is therefore ordered that said C. D. appear before the district court of county [*or before G. H., whom I hereby appoint referee for the purpose of taking such examination, at the town of*], on the day of, 18..., at ... o'clock ... M., to answer, under oath, all such questions concerning his property as may be propounded to him.

A copy of the order should be served on the defendant, and may be in the following form:

THE STATE OF NEBRASKA, COUNTY.¹

To the sheriff of said county:

You are hereby commanded to notify C. D. that, for good cause shown, I have made the following order, to-wit:

[*Copy order.*]

In witness whereof I have hereunto set my hand and affixed my official seal, this day of, 18...

L. M., *County Judge* [*or Judge of the District Court*].

NO. 726.

Order of Judge Appointing a Referee.

I hereby [*with the consent of the parties*] appoint G. H. referee in this case, to take the testimony offered in this case, and report the same to me [*or report the facts*]. It is further ordered that and be required to appear before said [*referee*], at the town of, on the day of, 18..., at ... o'clock ... M., to testify in said proceedings.

NO. 727.

Affidavit for Examination Before the Return of an Execution.

A. B., plaintiff in the above entitled action, being first duly sworn, deposes and says that on the day of, 18..., he recovered a judgment against the defendant C. D. for the sum of \$....., and \$..... costs, in the district court of county,

¹ *Union Bank, etc., vs. Union Bank, etc.*, 6 O. S., 255. In this case it was held that the notice, as it did not embody the order, was not sufficient to bind the bank.

and that on the day of, 18..., an execution was issued on said judgment directed to the sheriff of said county, who is unable to find property of said C. D. whereon to levy the same, and that said defendant C. D. is a resident of said county, and has property therein, which he unjustly refuses to apply to the satisfaction of said judgment.

A. B.

Subscribed, etc.

No. 728.

Order for Examination Before the Return of the Execution.

It satisfactorily appearing to me by the affidavit of A. B. that he has recovered a judgment against C. D., etc. [*recite the substance of the affidavit*],

It is therefore ordered that said C. D. appear before me at my office in the town of, on the day of, 18..., at ... o'clock ... M., then and there to answer under oath all questions concerning his property.

No. 729.

Examination of Judgment Debtor.

Examination of C. D., the defendant, in proceedings in aid of execution in this action, taken and had before, judge of the [*district court*] at, on the day of, 18...

Said defendant C. D., being first duly sworn, deposes and says: [*Copy the examination.*]

[Signed]

C. D.

No. 730.

Order for Application of Property in Debtor's Hands.

It satisfactorily appearing to me from the examination of C. D., defendant, that he has in his hands the following property, to-wit: [*describe property*], which is not exempt from execution,

It is therefore ordered that he deliver the same to the [*sheriff*] of said county, to be applied in satisfaction of the judgment in this action.

No. 731.

Order to Third Party to Deliver the Property of the Defendant.

It satisfactorily appearing to me, from the examination of, that he has in his hands the following property belonging to C. D., to-wit: [*describe property*],

It is therefore ordered that said deliver said property to the sheriff of said county, to be applied in satisfaction of the judgment rendered in this action.

If it is necessary to apply for the appointment of a receiver follow the forms in the chapter on Receivers, *ante* page 448.

No. 732.

Affidavit for an Attachment on Failure of Judgment Creditor to Attend and Submit to an Examination.

A. B., being first duly sworn, deposes and says that on the day of, 18..., he obtained the following order for the examination of C. D.: [*copy the substance of the order*]; that said C. D. failed to appear before said, judge, at the time and place fixed in said order, and has failed and refused to submit to an examination on oath concerning his property, and has disobeyed said order.

A. B.

Subscribed, etc.

A rule to show cause should be entered unless there is danger of the debtor escaping. See *ante* page 470.

A record of the proceedings should be kept by the judge before whom they are had.

In most cases an action in equity to subject the property of the judgment debtor to the payment of the judgment will be found more satisfactory than by summary proceedings under the code. But when the property of the debtor can readily be reached, summary proceedings may be sufficient.

CHAPTER XXXV.

ACTIONS CONCERNING REAL PROPERTY.

Code, § 626. *In an action for the recovery of real property* it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and thirty-

three, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived.

It shall be sufficient in such action if the defendant in his answer deny generally the title alleged in the petition, or that he withholds possession, as the case may be; but if he deny the title of the plaintiff, possession by the defendant shall be taken as admitted. § 627.

Where he does not defend for the whole premises the answer shall describe the particular part for which defense is made. *Id.*

Section 628. *In an action by a tenant in common* of real property against a co-tenant the plaintiff must state, in addition to what is required in the first section of this chapter, that the defendant either denies the plaintiff's right or did some act amounting to such denial.

Section 629. In an action for the recovery of real property, when the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property.

Section 630. *New trial.* In an action for the recovery of real property a party against whom a judgment is rendered may, at any time during the term at which judgment is rendered, demand another trial by *notice on the journal*, and thereupon the judgment shall be vacated, and the action shall stand for trial at the next term.

Section 631. No further trial can be had in such action except upon appeal, unless for good cause shown, as in other actions.

Section 632. The parties in an action for the recovery of real property may avail themselves, if entitled thereto, of the relief of the statutes in force for the relief of occupying claimants of land.

Section 633. If a guardian, tenant for life or years, joint tenant, or tenant in common, of real property, commit waste thereon he is liable to pay three times the damages which have resulted from such waste to the person who is entitled to sue therefor.

Section 634. *Judgment of forfeiture* and conviction may be rendered against the defendant whenever the amount of damages so recovered is more than two-thirds the value of the interest such defendant has in the property wasted, and when the action is brought by the person who is entitled to the reversion.

Section 635. *Any person whose duty it is to prevent waste*, and who has not used reasonable care and diligence to prevent it, is deemed to have committed it.

For forms of petition see page 336.¹ For forms of answers² see pages 367, 368. Adverse enjoyment 349. Petition of landlord to intervene, see page 82.

No. 733.

Verdict for the Plaintiff for the Recovery of Real Estate.

We, the jury duly impaneled and sworn in the above entitled cause, find that the plaintiff has a legal estate in and is entitled to the possession of the real property described in the petition, and that the defendant unlawfully keeps him out of the possession of the same, and we assess the damages of the plaintiff, by reason of the premises, at the sum of \$.....

L. M., *Foreman.*

No. 734.

Verdict for Damages when Right of Recovery Terminated during the Pendency of the Action. § 629.

We, the jury duly impaneled and sworn in the above entitled cause, find that at the time this action was commenced the plaintiff had a legal estate in and was entitled to the possession of the real property described in said petition, but that his right thereto terminated on the day of, 18... We also find that the defendant unlawfully kept him out of the possession of said premises, and we assess the damages of the plaintiff by reason thereof at the sum of \$.....

No. 735.

Verdict for the Defendant.

We, the jury, duly impaneled and sworn in the above entitled cause, find that the plaintiff has not a legal estate in, and is not

¹ The plaintiff must possess a legal estate in the premises and be entitled to the possession thereof to recover, and must recover on the strength of his own title, and cannot rely on the weakness of the title of his adversary.

² An equitable defense may be set up in the answer to defeat a recovery.

entitled to the possession of the premises described in the petition.

L. M., *Foreman*.

No. 736.

Judgment for the Possession of Real Property and Damages for Withholding.

It is therefore considered by the court that the plaintiff recover from the defendant the real property described in the petition, to-wit: [*describe property*], and also \$....., his damages, together with \$....., the costs of this action.

And thereupon the [*defendant*] made application to the court for the valuation of lasting and valuable improvements made on said lands by him as provided in the act for the relief of occupying claimants. And the court, being fully advised in the premises, finds that he is entitled thereto.

It is therefore ordered that a jury be impaneled for the purpose of assessing the same in the usual manner provided by law in civil cases.¹

No. 737.

Judgment for Damages under Section 629 of the Code.

It is therefore considered by the court that the plaintiff recover from the defendant the sum of \$..... and the costs of this action taxed at \$.....

No. 738.

Notice on Journal of Demand for a Second Trial.

I hereby demand another trial in this action.

C. D.,

By S. H., *his Attorney*.

Dated this day of, 18...

No. 739.

Order Setting Aside Judgment and Granting a Second Trial.

This cause came on for hearing on the demand of the defendant for a second trial in this action, on consideration whereof the verdict and judgment heretofore rendered are set aside and vacated, and a new trial granted in this action, the costs to abide the event of the suit.

¹ The jury will be impaneled by the court.

No. 740.

Assessment by Jury of the Value of Lasting and Valuable Improvements, etc.

We, the jury duly impaneled and sworn in the above entitled cause, upon actual view of the premises described in the petition, upon oath do assess the value of all lasting and valuable improvements made by the defendant on the lands in question prior to the [date of notice of adverse title], at the sum of \$.....; and we assess the damages which said land has sustained by waste committed thereon by the defendant at the sum of \$..... We also find the net annual value of the rents and profits which the defendant has received from said land since the day of, 18... [date of service of summons], is the sum of \$....., which sums, being deducted from the value of the lasting and valuable improvements, leave the sum of \$....., which we assess to [the claimant] as the amount of his recovery therefor. We also find the value of the land in question, on the day of, 18... [date of the judgment], without the said improvements made thereon, or damages sustained by waste, at the sum of \$.....

L. M., Foreman.

No. 741.

Order Setting Aside the Assessment.

This cause came on for hearing upon the motion of the [plaintiff] to set aside the assessment made by the jury herein, and was submitted to the court, on consideration whereof said motion is sustained and said assessment set aside. And it is further ordered that another valuation of all lasting and valuable improvements and assessment of damages sustained be had as provided in the act for the relief of occupying claimants.

No. 742.

Judgment when the Plaintiff Elects to take the Value of the Real Estate without the Improvements.

This cause came on for hearing upon the assessment and valuation made by the jury under the act for the relief of occupying claimants, and was submitted to the court, and the plaintiff electing to take* the value of said land as assessed by the jury, without the improvements, at the sum of \$....., and to execute his deed to the defendant for the same,

The court does therefore allow said defendant to pay to the plaintiff said sum of \$....., on or before the day of, 18..., and the plaintiff thereupon to execute and deliver to the defendant a good and sufficient deed for the aforesaid lands.

No. 743.

Judgment when the Plaintiff Elects to Take the Land.

Follow the preceding form to the *, then say: said land. It is therefore ordered that within days from this date the plaintiff pay to the defendant the sum of \$..... and the costs of this proceeding; and in case such payments are made as above provided, a writ issue to the sheriff of this county requiring him to put the plaintiff in possession of said premises.

No. 744.

Actions to Quiet Title.

An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons who claim an adverse interest or estate therein, for the purpose of determining such estate or interest, and quieting the title of said real estate. Gen. Stat., 882.

A party not in actual possession, in order to maintain the action, must have the legal title to the same. *The State v. S. C. & P. R. R.* 7 Neb., 357. *Douglass v. Scott*, 5 Ohio, 194.

For forms of petitions see *ante* pages 263, 276, 323.

No. 745.

Decree Quieting Title.

This cause came on for hearing upon the petition, answer, and the evidence, and was submitted to the court, on consideration whereof the court finds that at the commencement of this action the plaintiff was in the possession of the lands described in said petition, and had a legal estate therein, and was entitled to the possession thereof. The court also finds that said defendant has no estate or interests in said lands, and is not entitled to the possession of the same.

It is therefore considered by the court that the title and possession of said plaintiff in the following described premises, to-

wit: [*describe premises*], be and the same hereby are quieted and confirmed in the plaintiff, and said defendant and all persons claiming under him are hereby enjoined from claiming any interest in said premises adverse to that of the plaintiff or from interrupting his use and enjoyment thereof.

CHAPTER XXXVI.

PARTITION.

When the object of the action is to effect the partition of real property among several joint owners, the petition must describe the property and the several interests and estates of the several joint owners if known.

All tenants in common, or joint tenants, may be compelled to make or suffer partition of such estate, or estates, in the manner hereinafter prescribed.

If the number of shares or interests is known, but the owners thereof are unknown, or if there are or are supposed to be any interests which are unknown, contingent, or doubtful, these facts must be set forth in the petition with reasonable certainty.

Creditors having a specific or general lien upon all or any portion of the property may or may not be made parties at the option of the plaintiff.

If the lien is upon one or more undivided interests of any of the parties it shall, after partition or sale, remain a charge upon those particular interests or the proceeds thereof. But the due proportion of costs is a charge upon those interests paramount to all other liens.

The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may deny the interests of any of the plaintiffs, and by supplemental pleadings, if necessary, deny the interests of any of the other defendants.

Where there are two or more plaintiffs they may reply jointly, or either of them may reply to any or all of the answers of the defendants.

Issues may thereupon be joined and tried between any of the contesting parties, the question of costs on such issues being regulated between the contestants agreeably to the principles applicable in other cases.

Each of the parties appearing, whether as plaintiff or defendant, must exhibit his documentary proof of title, if he has any, and must file the same or copies thereof with the clerk.

If the statements in the petition and answer are not contradicted in the manner aforesaid, or by the documentary proof exhibited as above required, they shall be taken as true.

After all the shares and interests of the parties have been settled in any of the methods aforesaid judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly.

Upon entering such judgment the court shall appoint referees to make partition into the requisite number of shares.

For good and sufficient reasons appearing to the court the referees may be directed to allot particular portions of the land to particular individuals. In other cases the shares must be made as nearly as possible of equal value.

If it appears to the referees that partition cannot be made without great prejudice to the owners, they shall so report to the court.

If satisfied with such report the court shall cause an order to be entered, directing the referees to sell the premises so situated, and shall also fix the terms of sale.

Before proceeding to sell, the referees shall each give security, to be approved by the court or judge thereof, conditioned for the faithful discharge of his duties. At any time thereafter the court may require further and better security.

The same notice of sale shall be given as when lands are sold on execution by the sheriff, and the sale shall be conducted in like manner.

After completing said sale the referees must report their proceedings to the court, with a description of the different parcels of land sold to each purchaser, and the price bid therefor, which report shall be filed with the clerk.

After making the order of sale as aforesaid the court shall di-

rect the clerk to report whether there be any general incumbrance by mortgage, judgment, or otherwise upon any portion of the property.

If deemed advisable the court may appoint a referee to inquire into the nature and amount of incumbrances and report accordingly. From that report an appeal lies to the court.

The referee shall give the parties interested at least five days' notice of the time and place when he will receive proof of the amount of such incumbrances. In taking such proof he may receive, with other evidence, the affidavit of the parties interested. Code, §§ 802, 822.

The defendants may be served in the same manner as in an ordinary civil action by summons or by publication, as provided in this code, and when all parties in interest have been duly served any of the proceedings herein prescribed shall be binding and conclusive upon them all. If only a portion of such parties are served they only shall be bound by such proceedings. § 839.

For forms of petitions see *ante* pages 329–331.

If any of the defendants are minors it is the duty of the court to appoint a guardian *ad litem* to answer for them.

NO. 746.

Order Appointing Guardian Ad Litem.

The defendant C. D., who is a minor under fourteen years of age, having been duly served with summons in this cause, makes application to the court for the appointment of a guardian *ad litem*.

It is therefore ordered that E. F. be and he hereby is appointed a guardian for said minor in this action.

NO. 747.

Answer of Guardian Ad Litem.

E. F., the duly appointed guardian *ad litem* herein for C. D., in answer to the petition of the plaintiff, alleges, etc. [*state such facts as do not appear in the petition necessary to secure the defendant's rights, and deny whatever may be prejudicial to the minor*]. Code, § 107. No verification is required.

For form of judgment confirming shares see *ante* page 413.

No. 748.

Commission to Referees to Make Partition.

THE STATE OF NEBRASKA, COUNTY.

To G. H., I. J., and K. L.:

Whereas, in an action pending in the district court of county, wherein A. B. is plaintiff and C. D. and are defendants, it was found by said court on the day of, 18..., that the plaintiff and said defendants are each the owners in fee simple of the undivided one [*fourth*] part of the following described real estate, to-wit: [*describe premises*].

And judgment was thereupon rendered by said court confirming said shares and interests, and directing partition to be made accordingly, and G. H., I. J., and K. L. were appointed referees to make such partition.

Now therefore, you are hereby authorized and commanded to make partition of said real estate between the following persons: [*giving the names*], by assigning to each of them in severalty one [*fourth*] in value of the same in the manner provided by law.

You will report in writing with your doings hereon on or before the day of, 18....

Witness my hand and the seal of said court this day of, 18....

[L.S.]

L. L., *Clerk of the District Court.*

Oath of referees. Section 1, chapter 6, Gen. Stat., provides that all state, district, county, precinct, and especially appointed officers, shall, before entering upon their respective duties, take and subscribe the following oath, which shall be endorsed on their respective bonds: "I do solemnly swear that I will support the constitution of the United States, the constitution of the State of Nebraska, and faithfully and impartially perform the duties of the office of, according to law, and to the best of my ability. So help me God."

Special provisions as to form of oath will control the general provision.

No. 749.

Report of Referees that Premises Cannot be Divided.

The undersigned referees, duly appointed by the district court of county, in an action pending therein, wherein A. B. is

plaintiff and, defendants for the partition of the following described premises, to-wit: [*describe premises*], having taken the oath required by law, carefully examined the above described premises with a view to make partition thereof according to the respective rights and interests of the parties therein, and find that partition of said premises cannot be made without great prejudice to the owners thereof for the following reasons: [*state the reasons thus: said premises consist of 75 acres of land, part of which is in cultivation, and there is but one dwelling-house thereon. The entire tract can be sold for a fair price, but if divided the separate interests of the owners will be of little value*]; and in our opinion it is for the interest of the parties to have said premises sold, and the proceeds thereof divided.

In witness whereof we have hereunto set our hands this day of, 18...

G. H. }
I. J. } *Referees.*
K. L. }

No. 750.

Order Confirming Report and Directing a Sale.

This cause came on for hearing upon the report of the referees heretofore appointed herein, and the motion to confirm the same, and it appearing to the court that partition of said estate cannot be made without great prejudice to the owners thereof, and the court being satisfied with said report, the same is ordered to be entered of record.

It is therefore ordered that said referees proceed to sell said premises at public sale, as upon execution, at the front door of the court house in county, the terms of sale being one-third cash, one-third in one year, and one-third in two years, with approved security for and interest on deferred payments.

Said referees are required to make due return of their doings thereon on or before the day of, 18...

No. 751.

Bond of Referees.

Know all men by these presents that we, G. H. as principal and, as sureties, are held and firmly bound unto

[*the plaintiff and defendants*] in the penal sum of \$....., for the payment of which well and truly to be made we bind ourselves.

Dated this day of, 18...

Whereas, on the day of, 18..., the above bounden G. H., I. J., and K. L. were by the district court of county appointed referees in an action pending in said court, wherein A. B. is plaintiff and, are defendants, and it appearing to the court that the property involved in said action cannot be divided without great prejudice, to the owners, and therefore said court, on the day of, 18..., entered an order directing said referees to sell said premises.

Now therefore, if the said [*referees*] shall well and faithfully perform their duties as such referees and account for the proceeds of said sale, then this obligation to be null and void, otherwise to remain in full force and effect.

G. H.

I hereby approve the above bond and the security thereon this day of, 18...

I. J., *Judge*.

NO. 752.

Order Appointing Referee to Inquire into the Nature and Amount of Incumbrances.

It appearing to the court that there are incumbrances on the premises which are the subject of the action, and it being necessary that an account thereof should be taken before a sale of said premises, it is therefore ordered that the case be referred to E. F. to inquire into the nature and amount of incumbrances thereon and report accordingly.

The referee should notify all parties interested or claiming to have a lien or incumbrance on the premises of the time and place where a hearing thereon will be had. The notice must be served at least five days. If a question arise as to the amount due or the validity of an incumbrance, or the payment of the same, the court may direct an issue to be made up between the incumbrancer and the owner, which shall be decisive of their respective rights.

No. 753.

*Report of Referee as to Nature and Amount of Incumbrances.*¹

The undersigned, duly appointed by this court on the day of, 18..., to [*recite the order of appointment*], in pursuance of said order of the court, did, on the day of, 18..., at, after due notice to all parties interested, take the proof offered by said parties interested, which was by me reduced to writing, and is herewith returned.

I find that C. C. T. and M. O. R. have mortgages upon the interest of A. B. in said premises as follows: mortgage for \$....., executed by A. B. and wife to C. C. T., January 21, 18..., due August 1, 18..., upon which there is due at the date of this report the sum of \$.....; mortgage executed by A. B. and wife to M. O. R., July 1, 18..., due July 1, 18..., upon which there is now due the sum of \$..... I also find that judgment was recovered in the district court of county for the sum of \$..... on the day of, 18..., against, and is a lien on his share of said estate, and that there is now due thereon the sum of \$..... There is no other general lien or incumbrance upon the undivided share or interest of any of the parties to this action.

Fees [*items*].

E. F., *Referee*.

No. 754.

Exceptions to Report.

The plaintiff [*or C. D., defendant, or, claiming a lien on the premises*] excepts to the report of the referee in this case for the following reasons:

1. Because said referee allowed the sum of \$..... upon the mortgage executed by the plaintiff and wife to M. O. R., when it is clearly shown by the testimony that the same has been paid in full, but satisfaction thereof has not been acknowledged on the record.

2. [*Point out specifically the objectionable finding.*]

¹ Where a tenant in common has received the rents and profits a referee may be appointed to take and state an account between parties. *Mills v. Miller*, 3 Neb., 93.

The plaintiff therefore prays that said report may be set aside or modified in accordance with the above exceptions.

A. B.

By S. J., *his Attorney.*

No. 755.

Order Overruling Exceptions.

This cause came on for hearing upon the exceptions filed by A. B. to the report of the referee E. F., and was submitted to the court, on consideration whereof the court doth overrule and disallow said exceptions.

No. 756.

Exceptions Allowed and Report Modified.

This cause came on for hearing upon the exceptions filed by A. B. to the report of the referee E. F., and was submitted to the court, on consideration whereof it is ordered that the first exception be allowed, and that said report be and the same hereby is modified by striking therefrom the sum of \$....., allowed M. O. R. on the mortgage executed by A. B. and wife to him, the same having been paid in full, and said mortgage is not a lien on said premises.

And it is further ordered that said report as so modified be and the same hereby is ratified and confirmed.

No. 757.

Report of Sale by Referees.

The undersigned respectfully report to the court that in pursuance of the order entered in said court on the day of, 18..., we caused a notice to be published in the *Weekly Gazette*, a newspaper printed and in general circulation in county, that we would offer said lands for sale at the door of the court house in said county on the day of, 18..., at 10 o'clock A.M. of said day, and at the time and place stated in said notice, and after publication of said notice for more than thirty days we offered said lands, to-wit: [*describe as in petition and order*], for sale at public auction, and sold the same to A. R. for the sum of \$....., he being the highest bidder therefor.

We further report that said A. R. has paid \$....., being one-third the amount of said bid, and tenders a mortgage, upon

[*describe premises*], which we deem ample security for the unpaid purchase money.¹

All of which is respectfully submitted.

G. H. }
I. J. } *Referees.*
K. L. }

The sale may be set aside for good cause shown. The grounds assigned will be somewhat similar to those in a motion to set aside a sale upon execution or order of sale.

NO. 758.

*Confirmation of Sale and Order for Deed and Distribution.*²

This cause came on for hearing upon the motion of the plaintiff to confirm the report of sale of the referees in this case, and was submitted to the court, on consideration whereof the court finds that said sale has been conducted in all respects according to law, and said proceedings and sale hereby are in all things approved and confirmed. And said referees are ordered to convey said premises to said purchaser by deed in fee simple.

And it is further ordered that out of the proceeds of said sale said referees pay—

First. The costs of this action, including \$..... for plaintiff's attorney.³

Second. To the treasurer of county \$....., taxes due on said premises.

Third. The residue of the proceeds of sale to be divided into [*four*] equal parts and paid as follows: the mortgage executed by A. B. and wife to C. C. T., upon which there is now due the sum of \$....., to be paid out of the share of A. B. in said estate, the residue of said fourth interest to be paid to A. B., as also one-fourth of the notes for deferred payments; and to the defendants,, and, each the sum of \$....., and in addition one-fourth of the notes for deferred payments.⁴

¹ The notes for the unpaid purchase money should be drawn in favor of the parties entitled thereto.

² Before confirmation an opportunity should be given all parties interested to contest the validity of the sale. Ordinarily this may be done by an order to show cause.

³ See *Lowe v. Phillips*, 21 O. S., 657.

⁴ The court may in its discretion require all or any of the parties, before they receive the moneys arising from the sale, to give satisfactory security to refund the same if it afterwards appear that they were not entitled to it.

No. 759.

Deed of Referees.

Know all men by these presents that—

Whereas, in an action of partition pending in the district court of county, wherein A. B. was plaintiff and [*names of defendants*] were defendants for the partition of the premises hereinafter described, the undersigned referees, appointed by said court to make partition of said real estate, made report in writing, duly signed, setting forth that partition of said lands could not be made without great prejudice to the owners thereof, which report was duly examined by said court, and said court being satisfied therewith confirmed the same, and thereupon made an order and caused the same to be entered, directing us as said referees to sell said premises on the following terms, to-wit: [*set forth the terms of sale, as in order*].

And in pursuance of said order we caused a notice to be published in the *Weekly Gazette*, a newspaper printed and in general circulation in county, that we would offer said lands for sale at the door of the court house in said county on the day of, 18..., at 10 o'clock A.M. of said day, and at the time and place stated in said notice, and after said notice had been published for more than thirty days we offered said lands, to-wit: [*describe lands*], for sale at public auction, and sold the same to A. R. for the sum of \$....., he being the highest bidder therefor: And afterwards, on the day of, 18..., said court approved and confirmed said sale, and by an order directed us as said referees to execute to said A. R. a deed conveying said lands to him in fee simple.

Now therefore we, G. H., I. J., and K. L., referees, in consideration of the premises and of the sum of \$....., so bid and paid by said A. R., and by virtue of the powers vested in us by law, do by these presents grant, sell, and convey unto the said A. R. and to his heirs and assigns the real estate described as follows: [*describe lands*], with all the appurtenances thereunto belonging, to have and to hold the same to him, the said A. R., and his heirs and assigns forever.

In witness whereof we have hereunto set our hands this day of, 18...

In presence of
E. V.

G. H.
I. J.
K. L.

Add acknowledgment as to sheriff's deed.

No. 760.

Report of Referees Making Partition.

In pursuance of the order of this court made in this cause on the day of, 18..., appointing the undersigned referees in partition and directing us to make partition of the following described real estate, to-wit: [*describe premises*], the undersigned having taken the oath required by law on the day of, 18..., made partition of said real estate as follows, to-wit: To the plaintiff A. B. we have allotted the parcel of land described as follows, to-wit: [*commencing at the north-east corner of section ..., in township ..., range ..., in county, running thence west rods, thence south rods, thence east rods, thence north rods to the place of beginning and containing acres*], which tract of land we have designated on the plat accompanying this report as lot "one." We have allotted to C. D. the parcel of land described as follows, to-wit: [*describe each share with reasonable particularity*], which tract of land we have designated on the plat accompanying this report as lot "two." [*Continue in the same manner with the remaining shares.*]

In order to make said partition we employed N. O., a competent surveyor, and O. P. and Q. R. as assistants, and with their aid have marked out the several shares of the parties aforesaid by visible monuments. A plat of the premises showing the respective shares of the parties is herewith returned, marked Ex. A.

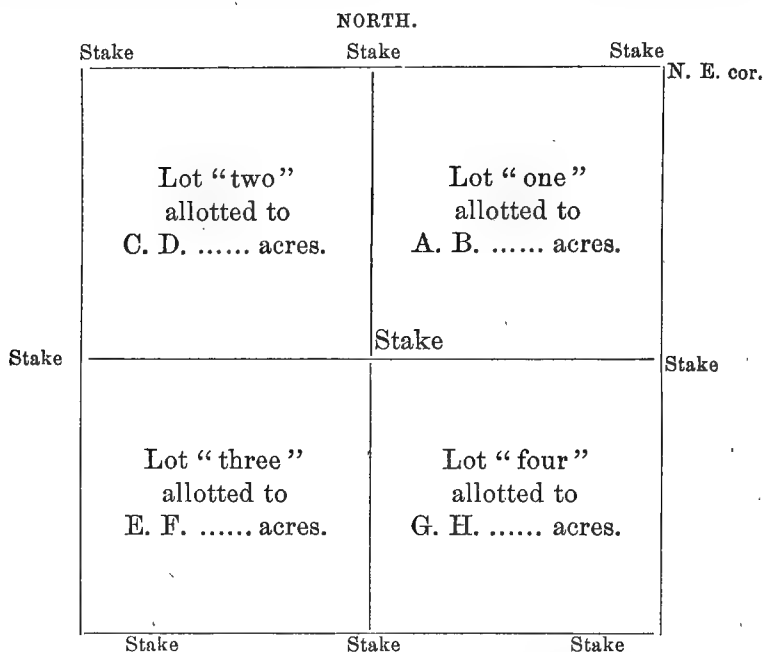
In witness whereof we have hereunto set our hands this day of, 18...

Expenses [*items*].

G. H. }
I. J. } *Referees.*
K. L. }

Ex. A. Plat of Premises.

A plat of the [*description of lands*], subdivided in an action of partition pending in the district court of county, wherein A. B. is plaintiff and C. D., E. F., and G. H. are defendants.



Unless the shares are allotted to their respective owners by the referees the clerk shall number them and draw the names of the future owners by lot.

No. 781.*Judgment Confirming Report.*

On this day of, 18..., this cause came on for hearing upon the report of the referees to make partition, heretofore appointed herein, and was submitted to the court, and the court having examined the same finds it to be correct, and that partition has been duly made by said [*referees*] in this action in conformity to law and the orders of this court, and the same is hereby approved and confirmed.

It is therefore considered by the court that the partition of the

[*describe premises*] made by said [*referees*] be and the same hereby is made firm and effectual forever.

It is further ordered that the costs incurred in this action, to-wit: the sum of \$....., and also \$..... as an attorney's fee to S. J., the attorney for the plaintiff in this action, be paid by the parties to the action in the following proportions, to-wit: [*state proportion, etc.*]

There should be a complete record made of the proceedings.

CHAPTER XXXVII.

DIVORCE AND ALIMONY.

For forms of petitions see *ante* pages 325, 329.

No. 762.

Petition for Alimony Pendente Lite where the Wife is Plaintiff.

1. A. B., the plaintiff herein, respectfully states to the court that on the day of, 18..., she commenced an action in this court against C. D. for a dissolution of the marriage contract existing between them, upon the ground of [*adultery*] on the part of said defendant. A copy of the petition is hereto annexed and made a part hereof.

[2. On the day of, 18..., said defendant answered the petition of the plaintiff in said action, denying the charge of adultery therein made, but the plaintiff alleges that said charge is true, and she will be able to prove the same on the trial of said cause.]¹

3. The plaintiff is entirely without means to carry on this action or to support herself during its pendency, and [*state the facts in regard to the number and age of children if in care of wife*].

4. The defendant is possessed of the following real estate, to-wit: [*describe premises*], which the plaintiff has reason to believe

¹ State the facts. The failure to answer will not prevent the court from allowing alimony in a proper case.

is free from incumbrances and is of the value of \$....., and is also possessed of personal property to the value of \$.....

The plaintiff therefore prays that the defendant may be required to pay the plaintiff a reasonable sum for her maintenance and support during the pendency of the action, and such further sum as will enable her to carry on this action.

A. B.

[*Verification.*]

No. 763.

Petition for Alimony Pendente Lite where Wife is Defendant.

1. Your petitioner respectfully states to the court that on the day of, 18..., A. B. commenced an action in this court against her for a dissolution of the marriage contract existing between them upon the ground of adultery.

2. On the day of, 18..., your petitioner filed an answer to said petition denying all the allegations therein except the allegation as to the marriage between the plaintiff in said action and the defendant.

3. [*Continue as in preceding form, changing the language to conform to the facts.*]

No. 764.

Order for Alimony Pendente Lite.

It satisfactorily appearing to the court that the [*plaintiff*] in this action is destitute of the means of support, and that the defendant [*husband*] should be required to pay her the sum of \$..... for her support and to enable her to carry on [*or defend*] the action,

It is therefore ordered by the court that the [*defendant*] pay to the plaintiff, or S. J., her attorney, the sum of \$..... within ... days from this date, and the further sum of \$..... upon the first day of each month during the pendency of the action, and that in default of such payment execution issue therefor.

No. 765.

*Affidavit for Service by Publication.*¹

A. B., plaintiff in the above entitled action, being first duly sworn, deposes and says that she has commenced an action

¹ The affidavit for publication is jurisdictional. *Shields v. Miller*, 9 Kan., 390. *Slocum v. Slocum*, 17 Wis., 150. *Forbes v. Hyde*, 31 Cal., 342. *Atkins v. Atkins*, 9 Neb., 191.

against the defendant in the district court of county for a divorce from the bonds of matrimony upon the ground that the defendant has willfully abandoned the plaintiff, without good cause, for the term of two years past, that said defendant is a non-resident of this state and absent therefrom, and service of summons cannot be made upon him in this state, and affiant asks for service by publication.

A. B.

Subscribed, etc.

No. 766.

Notice.

To C. D., non-resident defendant: You are hereby notified that on the day of....., 18..., A. B. filed a petition against you in the district court of county, Nebraska, the object and prayer of which are to obtain a divorce from you on the ground that you have willfully abandoned the plaintiff without good cause for the term of two years last past. You are required to answer said petition on or before Monday, the day of, 18...

A. B., *plaintiff*.

By S. J., *her Attorney*.

For proof of publication see *ante* page 53.

For forms of answers in divorce cases see *ante* pages 345, 370.

For forms of decrees see pages 416, 417.

No decree of divorce and of the nullity of a marriage shall be made solely on the declarations, confessions, or admissions of the parties, but the court shall in all cases require other satisfactory evidence of the facts alleged in the petition for that purpose.

In any suit brought for a divorce on the ground of adultery, although the adultery be established, the court may deny a divorce in the following cases:

First. When the offense shall appear to have been committed by the procurement or with the connivance of the complainant.

Second. When the offense charged shall have been forgiven by the injured party, and such forgiveness be proved by express proof or by the voluntary cohabitation of the parties with the knowledge of the offense.

Third. When there shall have been no express forgiveness and no voluntary cohabitation of the parties, but the suit shall not have been brought within five years after the discovery by the complainant of the offense charged. Gen. Stat., page 350.

Where the defendant is in default the court, before rendering a decree, should examine the record and see that the proper steps have been taken to give the court jurisdiction, otherwise the decree will be a nullity. See *Atkins v. Atkins*, 9 Neb., 192. A complete record should be made in the case.

Custody of children. Upon pronouncing a sentence or decree of nullity of a marriage, and also upon decreeing a divorce, whether from the bonds of matrimony or from bed and board, the court may make such further decree as it shall deem just and proper concerning the care, custody, and maintenance of the minor children of the parties, or any of them, and make a new decree concerning the same, as the circumstances of the parents and the benefit of the children shall require. Gen. Stat., 346, 347. See *Hoffman v. Hoffman*, 15 O. S., 427.

No. 767.

Petition for Custody of Children.

1. Your petitioner represents to the court that at the, 18... term of the district court of county a decree of divorce was rendered by said court in an action pending therein, wherein A. B. was plaintiff and C. D. was defendant, dissolving the bonds of matrimony between said parties and awarding the care and custody of [*names of the children*], minor children of said parties, to C. D.

2. Your petitioner further represents that said C. D. is a man addicted to the use of intoxicating liquors [*state any facts showing that the party having the custody of the children is not a suitable person to be entrusted with their nurture and education*].

Your petitioner therefore prays, etc.

No. 768.

Order Confiding Custody of Children to the Mother.

This cause came on for hearing upon the petition of A. B. and the evidence, and was submitted to the court, and it appear-

ing that the defendant has been duly notified of the pendency of this petition, and no one appearing in his behalf,

It is ordered that the care, custody, and education of [*names of children*] be confided to said petitioner until the further order of the court.

CHAPTER XXXVIII.

DOWER.

The widow of every deceased person shall be entitled to dower or the use during her natural life of one-third part of the lands whereof her husband was seized, of all estate of inheritance at any time during the marriage, unless she is lawfully barred thereof. G. S., page 276.

If the deceased shall have no issue his estate shall descend to his widow during her natural lifetime, and after her decease to his father. Id., 281. If he leave no kindred his estate shall descend to his widow. Id., 282.

Exchange of lands. If a husband seized of an estate of inheritance in lands exchange them for other lands his widow shall not have a dower of both, but shall have her election to be endowed of the lands given, or of those taken in exchange; and if such election be not^e evinced by commencement of proceedings to recover her dower of the lands given in exchange within one year from the death of her husband she shall be deemed to have elected to have taken her dower of the lands received in exchange.

When a person seized of any estate of inheritance shall have executed a mortgage of such estate before marriage his widow shall be entitled to dower out of the lands mortgaged, as against every person except the mortgagee and those claiming under him.

Where a husband shall purchase lands during coverture, and shall

at the same time mortgage his estate in such lands to secure the payment of the purchase money, his widow shall not be entitled to dower out of such lands, as against the mortgagee and those claiming under him, although she shall not have united in such mortgage; but she shall be entitled to dower as against all other persons.

When a widow shall be entitled to dower out of any lands which shall have been aliened by her husband in his lifetime, and such lands shall have enhanced in value after the alienation, such lands shall be estimated in setting out the widow's according to their value at the time they were so aliened.

When a widow is entitled to dower in lands, and her right is not disputed by the heirs or devisees, or persons claiming under them, the county judge has authority to appoint three discreet, disinterested persons to set off the dower by metes and bounds.¹ Gen. Stat., 276-7.

For forms of petitions see *ante* pages 331, 333.

No. 789.

Decree for Dower.

This cause came on for hearing upon the petition, answers of the defendants, and the evidence, and was submitted to the court; on consideration whereof the court finds that C. D. in his lifetime was seized in fee simple of the following described real estate, to-wit: [*describe premises*], and that the plaintiff is the widow of said C. D. and is entitled to dower in said premises, and to have the same assigned, and that said defendants have refused to assign the same.

It is therefore considered by the court that the plaintiff be endowed of one-third part of the premises described in the petition, as her dower therein as the widow of said C. D., and that E. F., G. H., and I. J. be and hereby are appointed by the court to assign said dower to said plaintiff according to law, and report said admeasurement to this court without delay.

¹ A question may perhaps arise as to the jurisdiction of the probate court under the provisions of the constitution, but as the proceeding affects the possession and not the title, it is probable the court has jurisdiction, where the right to dower is not denied.

The remedies which the law gives to the widow to recover dower are more comprehensive than the old writ of dower. Although *prima facie* her remedy for dower is at law, yet when the title is admitted but impediments are thrown in the way of her proceedings, a court of equity will sustain an action for the admeasurement of her dower. *Swaine v. Perine*, 5 Johns. Ch., 482. *Cooper v. Whitney*, 3 Hill, 95. Willard Real Estate, etc., 74.

No. 770.

Report of Commissioners.

The undersigned E. F., G. H., and I. J., duly appointed by an order of this court to make admeasurement of the dower in this case, respectfully report that having first taken the oath required by law, we, on the day of, 18..., met at the premises described in said order, to-wit: [*describe premises as in decree*], and caused a survey to be made of the same, and in the presence of all parties interested we admeasured and laid off to said widow one-third part of said premises, as follows: [*describe the portion assigned to the widow*], and designated the same by monuments.

E. F.
G. H.
I. J.

Dated,, 18...
Expenses, [*items*].

No. 771.

*Decree of Confirmation.*¹

This cause came on for hearing upon the report of the persons appointed by the court to make an assignment of dower herein, and was submitted to the court, on consideration whereof the court finds that said assignment and proceedings have in all re-

¹ Rule 84 of the Supreme Court of New York provides that "whenever a party, as a tenant for life, or by the curtesy, or in dower, is entitled to the annual interest or income of any sum paid into court and invested in permanent securities, such party shall be charged with the expense of investing such sum, and of receiving and paying over the interest or income thereof; but if such party is willing and consents to accept a gross sum in lieu of such annual interest or income for life, the same shall be estimated according to the then value of an annuity of six per cent on the principal sum during the probable life of such person, according to the Portsmouth or Northampton tables. See *Jackson v. Edwards*, 7 Paige, 408.

spects been made in conformity to law, and the same are hereby approved and confirmed.

It is therefore ordered that said A. B. have the use and possession of the lands so assigned during her life.

A Table corresponding with the Northampton Tables showing the value of an annuity of one dollar, at six per cent, on a single life, at any age from one year to ninety-four inclusive.

Age	No. of years' purchase the annuity is worth	Age	No. of years' purchase the annuity is worth	Age	No. of years' purchase the annuity is worth	Age	No. of years' purchase the annuity is worth	Age	No. of years' purchase the annuity is worth	Age	No. of years' purchase the annuity is worth
1	10.107	17	12.655	33	11.423	49	9.563	65	6.841	81	3.156
2	11.724	18	12.562	34	11.331	50	9.417	66	6.625	82	2.926
3	12.348	19	12.477	35	11.236	51	9.273	67	6.405	83	2.713
4	12.769	20	12.398	36	11.137	52	9.129	68	6.179	84	2.551
5	12.962	21	12.329	37	11.035	53	8.980	69	5.949	85	2.402
6	13.156	22	12.265	38	10.929	54	8.827	70	5.716	86	2.266
7	13.275	23	12.200	39	10.819	55	8.670	71	5.479	87	2.138
8	13.337	24	12.132	40	10.705	56	8.509	72	5.241	88	2.031
9	13.355	25	12.063	41	10.589	57	8.343	73	4.781	89	1.882
10	13.285	26	11.992	42	10.473	58	8.173	74	4.565	90	1.689
11	13.212	27	11.917	43	10.356	59	7.999	75	4.354	91	1.422
12	13.130	28	11.841	44	10.235	60	7.820	76	4.154	92	1.136
13	13.044	29	11.763	45	10.110	61	7.637	77	3.952	93	0.806
14	12.953	30	11.682	46	9.980	62	7.449	78	3.742	94	0.518
15	12.857	31	11.598	47	9.846	63	7.253	79	3.514		
16	12.755	32	11.512	48	9.707	64	7.052	80	3.281		

Calculate the interest for one year upon the amount of the income to which the party is entitled, then multiply this interest by the number of years, and the product will be the gross value of the life estate at six per cent.

Carlisle Table of Expectation of Life.

Age	Prospect of life	Age	Prospect of life	Age	Prospect of life	Age	Prospect of life	Age	Prospect of life	Age	Prospect of life	Age	Prospect of life	Age	Prospect of life
0	38.72	13	46.51	26	37.14	39	28.29	52	19.68	65	11.79	78	6.12	91	3.26
1	44.68	14	45.75	27	36.41	40	27.61	53	18.97	66	11.27	79	5.80	92	3.37
2	47.55	15	45.00	28	35.69	41	26.97	54	18.28	67	10.75	80	5.51	93	3.48
3	49.82	16	44.27	29	35.00	42	26.34	55	17.58	68	10.23	81	5.21	94	3.53
4	50.76	17	43.57	30	34.34	43	25.71	56	16.89	69	9.70	82	4.93	95	3.53
5	51.25	18	42.87	31	33.60	44	25.09	57	16.21	70	9.18	83	4.65	96	3.46
6	51.17	19	42.17	32	33.03	45	24.46	58	15.55	71	8.65	84	4.39	97	3.28
7	50.80	20	41.46	33	32.36	46	23.82	59	14.92	72	8.16	85	4.12	98	3.07
8	50.24	21	40.75	34	31.68	47	23.17	60	14.34	73	7.72	86	3.90	99	2.77
9	49.57	22	40.04	35	31.00	48	22.50	61	13.82	74	7.33	87	3.71	100	2.28
10	48.82	23	39.31	36	30.32	49	21.81	62	13.31	75	7.01	88	3.59	101	1.79
11	48.04	24	38.59	37	29.64	50	21.11	63	12.81	76	6.69	89	3.47	102	1.30
12	47.27	25	37.86	38	28.96	51	20.39	64	12.30	77	6.40	90	3.28	103	0.83

CHAPTER XXXIX.

REFEREES.¹

All or any of the issues in the action, whether of law or fact, or both, may be referred upon the written consent of the parties, or, upon their oral consent in court, entered upon the journal.

When the parties do not consent the court may, upon the application of either, or of its own motion, direct a referee in either of the following cases:

First. Where the trial of an issue of fact shall require the examination of mutual accounts, or where the account is on one side only, and it shall be made to appear to the court that it is necessary that the party on the other side should be examined to prove the account; in which cases the referees may be directed to hear and report upon the whole issue, or upon a specific question of fact involved therein.

Second. Where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect.²

Third. Where a question of fact, other than that upon pleadings, shall arise upon motion or otherwise in any stage of an action.

The trial before referees is conducted in the same manner as a trial before the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments, as the court upon such trial.

¹ A purely legal action cannot be referred except by consent of the parties, as neither party can be deprived of his right of trial by jury in such cases. *Lamaster v. Schofield*, 5 Neb., 148. *Mills v. Miller*, 3 Id., 74. A reference without the consent of parties can be made only in those cases where, under the former chancery practice, a reference could have been made.

² In actions relating to trusts, agency, partnership, etc., where the partnership, agency, trust, etc., are denied, no reference will be ordered until the court finds that the partnership, agency, etc., existed.

Referees must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner as decisions of the court.

The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court.

When the reference is to report the facts, the report has the effect of a special verdict.

NO. 772.

Order of Reference by Oral Consent.

Now came the parties in this case, and by their oral consent, given in open court, it is ordered that this cause be referred to G. H., who is hereby appointed referee, to hear the testimony [and reduce the same to writing], and to try the issues of fact [or law and fact] arising in the cause, and report his findings to the court by the day of, 18...

NO. 773.

Consent in Writing.

We hereby consent that the above entitled cause be referred to G. H. as sole referee to hear and determine the same.

[Signatures of the parties, or their attorneys.]

Dated,, 18...

NO. 774.

Order of Reference Without Consent.

This cause came on for hearing on the motion of the [plaintiff] to refer said cause, and was submitted to the court, and it appearing to the court that the action is one proper to be referred, and that it is necessary to examine mutual accounts between the parties,

It is therefore ordered, etc. [as in form No. 772].

NO. 775.

Findings of Fact.

In pursuance of an order of this court appointing the undersigned sole referee to find and report the facts at issue in this case, I took the oath required by law and fixed the day of

....., 18..., at, as the time and place for a hearing, and notified the parties thereof.

At the time and place above stated I proceeded to the trial of the matters above referred to me, the plaintiff appearing by S. J., his attorney, and the defendant by S. H., his attorney; and after hearing the evidence offered by the parties and the arguments of their attorneys I find the following facts:

1. That on the day of, 18..., the defendants C. D. and E. A. D. executed and delivered to A. B. the note and mortgage set forth in the petition.

2. That the sole consideration for said mortgage was the sum of \$....., then loaned by said A. B. to said C. D., and that the note was drawn for \$..... in excess of the amount actually owing by C. D. to said A. B.

3. That on the day of, 18..., and after said note had become due and payable, said A. B. sold and assigned the same, with the security, to the plaintiff.

All of which is respectfully submitted.

G. H. Referee.

No. 776.

Reference to Report on All the Issues.

In pursuance of an order of this court appointing the undersigned sole referee to hear and determine all the issues in this cause, I took the oath required by law and fixed the day of, 18..., at, as the time and place for a hearing, and notified the parties thereof.

At the time and place above stated I proceeded to the trial of said issues, the parties appearing by their attorneys, and after hearing the evidence offered by the parties and the arguments of their attorneys I find the following facts:

1. That the plaintiff has been a *bona fide* resident of county, in this state, since the day of, 18...

2. That on the day of, 18..., the plaintiff and defendant were married at, in the state of

3. That thereafter the plaintiff and defendant lived together as husband and wife until the day of, 18...

4. That on or about the day of, 18..., the defend-

ant committed adultery with one without the consent or procurement of the plaintiff.

5. That the plaintiff has not cohabited with the defendant since discovering that the defendant had committed said offense.

6. That the defendant possesses real and personal estate of the value of \$.....

Conclusions of Law.

1. That the plaintiff is entitled to a decree of divorce from the defendant.

2. That the plaintiff is entitled to the sum of \$..... as alimony.

All of which is respectfully submitted.

G. H., *Referee.*

No. 777.

Motion for Further Report.

The [*defendant*] moves the court to require the referee in this case to make a further report, stating therein [*state what is required within the scope of the order of reference*].

No. 778.

Exceptions to Report.¹

The [*defendant*] excepts to the report of the referee herein for the following reasons:

1. Because the referee finds that there is due from the defendant to the plaintiff upon the cause of action set forth in the petition the sum of \$..... for [*rent*], whereas the testimony shows that the entire sum received amounted only to the sum of \$.....

2. Because [*point out specifically each finding or conclusion excepted to*].

C. D.,

By S. H., *his Attorney.*

¹ The exceptions here referred to are exceptions to the findings of fact or conclusions of law of the referee in the final determination of the case, there being no opportunity to except orally to such findings or conclusions. But they do not apply to the decisions of the referee made during the progress of the trial. These must be excepted to at the time. Exceptions do not take the place of a motion for a new trial. These exceptions are filed in court, and not before the referee.

No. 779.

*Motion to Set Aside the Report and for a New Trial.*¹

The [defendant] moves the court to set aside the report of the referee and grant a new trial in this case for the following reasons:

1. [*Proceed as in a motion for a new trial in an action at law, ante page*]

2.

C. D.,

By S. H., *his Attorney.*

If no objection is made to the report by motion or otherwise, judgment will be rendered thereon as on the verdict of a jury.

CHAPTER XL.

COSTS AND SECURITY FOR COSTS.

In all cases in which the plaintiff is a non-resident of the county in which the action is brought, before commencing such action the plaintiff must furnish a sufficient surety for costs. The surety must be a resident of the county where the action is brought and approved by the clerk. His obligation shall be complete simply by indorsing the summons or signing his name on the complaint as security for costs. He shall be bound for the payment of all costs, which may be adjudged against the plaintiff in the court in which the action is brought or in any other to which it may be carried, and for costs of the plaintiff's witnesses, whether the plaintiff obtain judgment or not.

Action may be dismissed, when. An action in which security for costs is required by the last section, and has not been given, shall be dismissed on motion and notice by the defendant at any

¹ To obtain a review of a decision of a referee a motion for a new trial is necessary. *Simpson v. Gregg*, 5 Neb., 237. *Hulce v. Sherman*, 13 How. Pr., 411. *Morgan v. Bruce*, 1 Code Rep. G. S., 364. *Van Steenburg v. Hoffman*, 15 Barb., 28. *Smith v. Schank*, 18 Id., 346.

proper time before judgment, unless in a reasonable time, to be allowed by the court, such security for costs be given.

In case plaintiff becomes a non-resident. If the plaintiff in an action after its commencement become a non-resident of the county in which it is brought, he shall give security for costs in the manner and under the restrictions provided in the two preceding sections.

Additional security. In an action in which security for costs has been given the defendant may at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff.

And if on such motion the court be satisfied that the surety has removed from the state, or is not sufficient, the action may be dismissed, unless in a reasonable time, to be fixed by the court, sufficient security be given by plaintiff.

After final judgment has been rendered in an action in which security for costs has been given, as required by this chapter, the court, on motion of the defendant, or any other person having a right to such costs or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the defendant or his legal representatives against the surety for costs, his executors or administrators, for the amount of costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment as in other cases for the use and benefit of the persons entitled to such costs.

If any informer, under a penal statute, to whom the penalty or any part thereof, if recovered, is given, shall dismiss his suit or prosecution, or fail in the same, he shall pay all costs accruing on such suit or prosecution, unless he be an officer whose duty it is to commence the same.

Where defendants disclaim having any title or interest in land or other property, the subject matter of the action, they shall recover their costs, unless for special reasons the court decide otherwise.

Unless otherwise provided by statute the costs of motions, continuances, amendments, and the like, shall be taxed and paid as the court in its discretion may direct. Code, §§ 612, 619.

Costs may be allowed on a motion or demurrer, in the discretion of

the court or judge, not exceeding ten dollars, which shall be absolute against the losing party on such demurrer or motion, but these provisions do not apply to verbal motions or demurrers *ore tenus* during the course of the trial. A sum not exceeding \$10 may also be granted on a continuance. Laws of 1875, 63.

Allowed of course, when. When it is not otherwise provided by this and other statutes costs shall be allowed of course to the plaintiff upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific real or personal property.

Shall not recover costs, when. If it shall appear that a justice of the peace has jurisdiction of an action and the same has been brought in any other court the plaintiff shall not recover costs;¹ and in all actions for libel, slander, malicious prosecution, assault, assault and battery, false imprisonment, criminal conversation, seduction, actions for nuisance, or against a justice of the peace for misconduct in office, if the damages assessed be under \$5 the plaintiff shall not recover any costs.

Costs shall be allowed of course to any defendant upon a judgment in his favor in the actions mentioned in the last two sections.

In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable.²

Where several actions are brought on one bill of exchange, promissory note, or other obligation or instrument in writing, against several parties, who might have been joined as defendants in the same action, as allowed by section forty-four, no costs shall be recovered by the plaintiff in more than one of such actions if the parties proceeded against in the other actions were at the commencement of the previous action openly within the state.

When a summons is issued to another county than that in which the action or proceeding is pending it may be returned by mail, and the sheriff shall receive the same fees as if the summons had issued in the county of which he is the sheriff. Code, §§ 620-625.

¹ *Gere v. Sweet*, 2 Neb., 77. *Beach v. Cramer*, 5 Id., 98. *Miller v. Roby*, 9 Id., 471.

² See *Fraser v. Ingham*, 4 Neb., 531.

No. 780.

Motion for Security for Costs.

The defendant moves the court to require the plaintiff to give security for the costs of this action for the following reasons:

1. Because the plaintiff is a non-resident of county.

[Or because the plaintiff has removed from county since the commencement of the action.]

C. D.

By S. H., his Attorney.

No. 781.

Motion for Additional Security.

The defendant moves the court to require the plaintiff to give additional security for costs in this action for the following reasons:

1. Because E. F., the surety in this action, has removed from county.

[Or because E. F., the surety in this action, is insufficient.]

C. D.

By S. H., his Attorney.

No. 782.

Affidavit.

C. D., defendant in this action, being first duly sworn, deposes and says that A. B., the plaintiff herein, is a non-resident of county.

C. D.

Subscribed, etc.

No. 783.

Notice to Plaintiff.

You are hereby notified that on the day of, 18..., or as soon thereafter as I can be heard, I will move the court for security for costs in this action upon the ground that you are a non-resident of county.

C. D.,

By S. H., his Attorney.

No. 784.

Order Requiring the Plaintiff to Give Security for Costs.

This cause came on for hearing upon the motion of the defendant to require the plaintiff to give security for costs, and was submitted to the court, on consideration whereof it is ordered that unless the plaintiff give security for costs within ... days this action be dismissed.

No. 785.

Order Dismissing Action.

The plaintiff having failed to comply with the order of the court and give security for costs as therein required, this action is therefore dismissed at the costs of the plaintiff.

No. 786.

*Security for Costs Indorsed on Summons or Petition.*¹

I acknowledge myself security for costs in this case.

E. F.

I approve of the above surety.

K. L., Clerk of the District Court.

Dated,, 18...

No. 787.

Motion for Judgment Against Security.

C. D.² }
v. }
E. F. }

C. D. moves the court for judgment for the sum of \$..... against E. F., the security for costs in the case of A. B. v. said C. D., judgment for \$..... costs having been rendered in this court in said cause on the day of, 18..., in favor of C. D. and against A. B.

C. D.

By S. H., his Attorney.

No. 788.

Notice of Motion for Judgment Against Surety for Costs.

To [the surety]:

You are hereby notified that on the day of, 18..., or as soon thereafter as I can be heard, I will move for judg-

¹ See *Newsome's Adm. v. Ryan*, 18 Ohio, 245.

² Section 616.

ment against you for the sum of \$..... as security for costs in the case of A. B. v. C. D., I having, on the day of, 18..., recovered judgment against A. B. for the sum of \$....., costs in said action.

C. D.,

By S. H., *his Attorney.*

Dated,, 18...

No. 789.

Judgment Against Surety for Costs.

This cause came on for hearing upon the motion of C. D. for judgment against E. F., the surety for costs in the case of A. B. v. C. D., and was submitted to the court, and it appearing to the court that said E. F. has been duly notified of the pendency of this motion, and that C. D. has recovered the sum of \$....., judgment for costs in said action, and that the same are unpaid, and that said E. F. is liable for the payment thereof,

It is therefore considered by the court that C. D. recover from E. F. the sum of \$....., and his costs herein expended taxed at \$.....

No. 790.

Motion for Re-taxation of Costs.

The defendant moves the court for an order directing the clerk to re-tax the costs in this action for the following reasons:

1. [*Point out specifically the objections to the costs as taxed.*]

No. 791.

Order for Re-taxation.

This cause came on for hearing on the motion of the defendant for a re-taxation of costs, and was submitted to the court, on consideration whereof it is ordered that the clerk re-tax the costs in this action, charging to the plaintiff the costs of \$....., and to the defendant the costs of \$.....

When costs are improperly taxed the remedy is by motion. *Linton v. Housch*, 4 Kan., 536.

CHAPTER XLI.

ENTITLING PLEADINGS, MOTIONS, ETC. PROCESS.

Every petition, answer, demurrer, reply, motion, or affidavit¹ filed in the action should be entitled in the court wherein it is filed, thus:²

In the District Court of County:

A. B. }
v. }
C. D. }

A *journal entry* should state the names of the parties to the action thus:

A. B. }
v. }
C. D. }

No. 792.

Form of Order made by Judge in Vacation.

Before J. J., Judge of the District Court of county, Nebraska.

[Title of Cause.]

[Order.]

J. J., Judge.

Title when the proceedings are *ex parte*.

In the matter of the application of A. B.

For [state object].

The style of all process shall be "The State of Nebraska, county." It shall be under the seal of the court from whence the same shall issue, shall be signed by the clerk, and dated the day it is issued.³

An order for a provisional remedy or any other process, in an ac-

¹ See *Cook v. Staats*, 18 Barb., 408.

² The failure of a party to properly entitle his petition is not a fatal defect, but may be good ground for a motion to require the plaintiff to amend it. *Livingston v. Coe*, 4 Neb., 379.

³ Code, § 880.

tion wherein the sheriff is a party or is interested, shall be directed to the coroner. If both these officers are interested the process shall be directed to and executed by a person appointed by the court or judge.

The court or judge for good cause may appoint a person to serve a particular process or order, who shall have the same power to execute it which the sheriff has. The person may be appointed on the motion of the party obtaining the process or order, and the return must be verified by affidavit. He shall be entitled to the fees allowed the sheriff for similar services.

CHAPTER XLII.

REVIVOR OF ACTIONS.¹

If the order is made by consent of the parties the action shall forthwith stand revived; and if not made by consent the order shall be served in the same manner, and returned in the same time as a summons, upon the party adverse to the one making the motion, and if sufficient cause be not shown against the revivor the action shall stand revived.²

No. 793.

Suggestion of Death.

The [*plaintiff*] suggests to the court the death of C. D., defendant [*or one of the defendants*] herein, and that E. F. has been appointed administrator of his estate.³

No. 794.

Order of Revivor by Consent.

And now comes the [*plaintiff*] and suggests to the court that the defendant has died since this action was commenced, and

¹ The right to revive an action under the code is not dependent on the discretion of the court, but under the conditions and within the time limited is a matter of right. *Carter v. Jennings*, 24 O. S., 182. *Gillette v. Morrison*, 7 Neb., 262.

² Code, § 461.

³ A creditor may pray for the appointment of an administrator if the widow or next of kin fail to make application within thirty days. G. S., 310.

that E. F. has been appointed administrator of his estate, and the court being fully advised in the premises, and the parties consenting thereto, it is hereby ordered that the action stand revived in the name of E. F. as administrator and proceed against him [*or in his favor*].

No. 795.

Conditional Order of Revivor on the Death of the Defendant.

And now comes the plaintiff and suggests to the court that the defendant C. D. has died since this action was commenced, and that E. F. has been appointed administrator of his estate; and the court being fully advised in the premises, on motion of the plaintiff it is ordered that this action be revived in the name of E. F. as such administrator, and proceed against him, unless he show sufficient cause against said revivor within ... days after the service of this order upon him.

No. 796.

Conditional Order of Revivor on the Death of the Plaintiff.¹

And now comes E. F. and suggests to the court that the plaintiff has died since this action was commenced, and that he has been duly appointed administrator of his estate; and the court being fully advised in the premises, it is ordered on motion of said E. F. that the action be revived in his name as such administrator, unless sufficient cause be shown by the defendant against said revivor within ... days after the service of the order upon him.

No. 797.

Final Order of Revivor.

Now comes the plaintiff, and it appearing to the court that the conditional order of revivor herein was duly served on said [*E. F.*] on the day of, 18..., and no sufficient cause being shown against said revivor, it is therefore ordered that this action stand revived in the name of E. F. as administrator, and proceed against him.

¹ The order may be made forthwith, but without the consent of the defendant cannot be made after the expiration of a year from the time the order might have been first made. Code, § 467.

No. 798.

Revivor of Judgment on the Death of the Plaintiff or Defendant.

And now comes the plaintiff [*or E. F.*] and suggests to the court that the [*defendant*] has died since judgment was recovered in this action, and that E. F. has been appointed administrator of his estate, and that there still remains due and unpaid on said judgment the sum of \$....., and the court being fully advised in the premises, on motion of the plaintiff it is ordered that said E. F. show cause within ... days from the service of this order why said judgment for the sum of \$..... should not stand revived against him as administrator of the estate of C. D. deceased.

No. 799.

Order of Revivor.

And now comes the [*plaintiff*], and it appearing to the court that the conditional order of revivor herein was duly served upon E. F. on the day of, 18..., and no sufficient cause being shown to the contrary, it is ordered that the judgment in favor of the plaintiff and against C. D. rendered at the, 18..., term of this court for the sum of \$....., and \$..... costs of the action, be and the same hereby is revived against E. F. as administrator of the estate of C. D. deceased.

No. 800.

Conditional Order of Revivor of Dormant Judgment.

And now comes the plaintiff and shows to the court that the judgment rendered in this action on the day of, 18..., for the sum of \$..... and \$..... costs of suit, has become dormant by lapse of time, and is unpaid.

It is therefore ordered by the court that said judgment be revived, unless sufficient cause be shown by said defendant against said revivor within ... days from the service of this order upon him.

No. 801.

Order of Revivor of Dormant Judgment.

And now comes the plaintiff, and it appearing to the court that the conditional order of revivor made by this court was duly served on the defendant on the day of, 18...,

and that said judgment is unpaid, and no sufficient cause being shown why said judgment should not be revived, it is ordered that said judgment stand revived for the sum of \$....., with interest from the day of, 18..., and \$..... costs of suit.

No. 802.

Conditional Order where Payments have been Made.

And now comes the plaintiff and shows to the court that the judgment rendered in this action on the day of, 18..., for the sum of \$..... and \$..... costs of suit, has become dormant by lapse of time, and that the following payments have been made thereon, to-wit: [*state amount and date of payment*], and that there now remains due thereon the sum of \$.....

It is therefore ordered by the court that said judgment be revived for the sum of \$....., unless sufficient cause be shown by the defendant against said revivor within ... days from the service of this order upon him.

A judgment of revival is merely a continuation of the original action, and continues the vitality of the original judgment with all its incidents from the time of its rendition. *Eaton v. Hasty*, 6 Neb., 419.

CHAPTER XLIII.

APPEALS TO THE DISTRICT COURT.

Pleadings when to be filed. In all cases of appeal from the county court or a justice of the peace the plaintiff shall, within twenty days from and after filing his transcript in the district court as required by law, file his petition as required in civil cases in the court to which such appeal is taken; and the answer shall be filed and issue joined as in cases commenced in such appellate court. Laws of 1877, page 17.

No notice of appeal is necessary in appealing from the judgment of a justice of the peace, and the same is true in appealing from the judgment of the county court in a *civil action*.

Where an appeal is taken from a decision allowing or disallowing a claim against an estate, the party appealing shall, after the appeal is taken, give notice of such appeal and the hearing thereof in the district court by service of notice thereof on the adverse party; or, if personal service cannot be had, by causing the same to be published two successive weeks in some *weekly* newspaper of general circulation in the county, the notice to be complete ten days before the next succeeding term of court. § 236, Chapter 17, G. S.

No. 803.

Notice of Appeal.

[Title of Cause.]

To A. B.:

You are hereby notified that the defendant C. D. has appealed from the decision of the county judge of county [or, *commissioners*], disallowing [or *allowing*] the claim of C. D. for the sum of \$..... against the estate of E. F., to the district court of county, and that said appeal will come on for hearing and trial in said court at the, 18..., term thereof, to be held at on the day of, 18...

C. D.,

By S. H., *his Attorney.*

Dated,, 18...

The claimant must also file a bond in the county court within ten days from the time the decision is made, conditioned to prosecute the appeal to effect without unnecessary delay and pay all damages awarded on the appeal.

No pleadings seem to be required on such an appeal, but the district court undoubtedly may order pleadings to be filed.

Appeal from a decision of the county board. The judgment of a county board in allowing or rejecting a claim is final unless an appeal be taken. The jurisdiction of the district court is appellate only. *Brown v. Otoe co.*, 6 Neb., 111. *Clark v. Buffalo Co.*, Id., 454.

The county board need not make a finding or render a formal judgment in allowing or rejecting an account. It is sufficient if it is "allowed" or "disallowed."¹

¹ *Black v. Saunders Co.*, 8 Neb., 440.

No. 804.

Notice of an Appeal from a Decision of the County Board Allowing or Disallowing an Account.

To [*name of the chairman of the board*].

You are hereby notified that I shall appeal to the district court of county from the decision of the county board made on the day of, 18..., in rejecting [*or allowing*] the claim of against county.

A. B. [*or name of tax payer*].

A bond must also be filed. No pleadings seem to be required.

In taking an appeal from the assessment of damages for land appropriated by a railroad company to the district court, the appellant is not required by the statute to execute an appeal bond. *Nebraska Railway Company v. Van Dusen*, 6 Neb., 160.

In such an appeal it is not necessary to file pleadings in the case in the district court—a jury is impaneled by the court to hear the proof and assess the damages sustained by the owner of the land taken by the railroad company. Id.

CHAPTER XLIV.

PROCEEDINGS IN ERROR IN THE DISTRICT COURT.

A judgment rendered or final order made by a probate court, justice of the peace, or any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court.

An order affecting a substantial right in an action, when such order in effect determines the action and prevents the judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed.

A petition in error or appeal lies only to a final order. A decree to be final must dispose of the whole merits of the case, and leave nothing for the further consideration of the court; it must affect a substantial right and determine the action. *Smith v. Sahler*, 1 Neb., 310. *Leaf v. Hewett*, 1 O. S., 54. *Mills v. Miller*, 2 Neb., 309.

The proceedings to obtain such reversal, vacation, or modification, shall be by petition to be entitled "petition in error," filed in a court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made, as in the commencement of an action. A service on the attorney of record in the original case shall be sufficient. Code, §§ 580, 581, 583.

For form of *petition in error* see post page 578.

No. 805.

Summons in Error.

THE STATE OF NEBRASKA, COUNTY.

To the sheriff of said county:

You are hereby commanded to notify A. B. that C. D. has filed a petition in error in the district court of county to obtain a reversal of the judgment in the case of A. B. v. C. D., tried on the day of, 18..., before E. F., a justice of the peace of said county, wherein judgment was rendered in favor of said A. B. and against said C. D.

You will make due return of this summons on the day of, 18... [*the first day of the term of court unless issued in term time*].

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 18...

[L. S.]

K. L., *Clerk of the District Court.*

No. 806.

Waiver of Summons in Error.

I hereby waive the issuing and service of a summons in error in this case and enter an appearance therein.

A. B.

Dated, 18...,

By S. J., *his Attorney.*

Until the petition in error is filed there is no authority to issue the summons. *The City of Brownville v. Middleton*, 1 Neb., 14.

No answer to the petition in error is required. The questions presented are not questions of fact but of law, and the petition need not be verified. *Newlove v. Woodward*, 9 Neb., 503.

Diminution of record. It will sometimes be found that the record is not complete. In such case either party may suggest a diminution of the record. When this is done the court will order the court below to send up a perfect transcript of its record.

No. 807.

Suggestion of Diminution.

The [*plaintiff*] herein suggests to the court that the transcript of the proceedings filed with the petition in error in this case is defective and incomplete in the following particulars: [*point out specifically the omissions complained of*], and that the [*matter omitted*] is in the original transcript.

The [*plaintiff*] therefore prays that an order may be sent to said [*justice of the peace*], commanding him forthwith to certify to this court a full and correct transcript of the proceedings in said case.

A. B.

By S. J., *his Attorney.*

[*Venue.*]

I, A. B., plaintiff, do solemnly swear that the facts above stated are true as I believe.

A. B.

Subscribed, etc.

No. 808.

Order for Complete Transcript.

Upon the suggestion of the [*plaintiff*] that the transcript of the proceedings of the justice is defective and incomplete, it is therefore ordered that said E. F., justice of the peace, forthwith certify to this court a complete and perfect transcript of the proceedings in said cause.

No. 809.

Judgment Affirmed.

And now on this day this cause came on to be heard upon the petition in error and the transcript of the proceedings, and final judgment of E. F., a justice of the peace of county, and was submitted to the court, on consideration whereof the court finds no error in said judgment and proceedings.

It is therefore considered by the court that said judgment be and the same hereby is affirmed, and that the defendant recover his costs herein expended taxed at \$....., and it is ordered that execution be awarded in this court to carry into effect said judgment.

No. 810.

Judgment Reversed. Cause Retained for Trial.

And now on this day this cause came on to be heard upon the petition in error and the transcript of the proceedings, and final judgment of E. F., a justice of county, and was submitted to the court, on consideration whereof the court finds that there is error in said judgment and proceedings.*

It is therefore considered by the court that said judgment be and the same hereby is reversed at the costs to the present time of the defendant in error, and it is ordered that said cause be retained for trial and judgment, pleadings to be filed as in case of appeal.

No. 811.

Reversed and Dismissed.

Follow the preceding form to the *, then add: In this, because said justice had no jurisdiction of the subject matter of the action [*or of A. B.*], and no authority to render judgment.

It is therefore considered by said court that said judgment be and the same hereby is reversed and the cause dismissed at the costs of the defendants in error.

CHAPTER XLV.

MANDAMUS.

A writ of mandamus is granted merely to compel action and enforce the performance of a pre-existing duty. It creates no new authority, nor confers any powers which did not previously exist. High on Ex. Rem., § 7. The State v. School District, 8 Neb., 94.

Its object is not to supersede legal remedies, but rather to supply the want of them. *Id.* The writ is never granted in anticipation of an omission of duty. To entitle the relator to the writ he must show that the respondent is actually in default in the performance of a legal duty then due at his hands. *Id. State v. Carney, 3 Kan., 88.* A demand and refusal are prerequisite to instituting the proceedings, where the duties affect only the rights of individuals, but when the duties are of a public nature, no demand seems to be necessary. *High on Ex. Rem., § 13.*

An alternative writ must contain a statement of all the facts necessary to justify the order sought for by the proceeding, and on the hearing omissions in the alternative writ cannot be supplied by the affidavit or application on which it was allowed. McKenzie v. Ruth, 22 O. S., 371. Canal Trustees v. The People, 12 Ill., 254. People v. Supervisors, 15 Barb., 607. High on Ex. Rem., § 537. The State v. School District, 8 Neb., 93-4.

The writ shall not be issued in any case where there is a plain and adequate remedy in the ordinary course of the law. *Code, § 646.*

No other pleading or written allegation is allowed than the writ and answer. *Id., 653.* A demurrer is an answer. *Hamilton County v. The People, 3 Neb., 244.*

Where an inferior tribunal has a discretion the writ will not be granted to control the discretion of such tribunal, but if it refuses to act mandamus will lie to compel it to exercise its discretion.

For forms of affidavits see *ante* pages 333, 336.

The court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice. § 649.

No. 812.

Order to Show Cause why Writ should Not be Allowed.

Now on this day came the relator and filed his petition in this court, duly verified, praying for a writ of mandamus against the respondent.

It is therefore ordered that a hearing on said petition be had on the day of, 18..., at, and that due notice thereof be given to said respondent at least ... days before said hearing.

No. 813.

Notice of Application.

You are hereby notified that on the day of, 18..., or as soon thereafter as I can be heard, I will apply to the district court of county for a writ of mandamus to issue against you requiring you to [*state the object of the proceeding*].

A. B.,

By S. J., *his Attorney.*

Dated, 18...

No. 814.

Order Allowing Alternative Writ.

Now on this day came the relator and filed his petition in this court, duly verified, praying for a writ of mandamus against the respondent, and it appearing that said respondent had due notice of the time and place of said hearing, and no sufficient reason being shown against issuing the same, it is ordered that an alternative writ of mandamus issue against said, commanding him [*state what he is required to do*], returnable on the day of, 18...

No. 815.

Alternative Writ.

THE STATE OF NEBRASKA, COUNTY.

To [*the name of the respondent*].

Whereas, it has been suggested to us by the affidavit of A. B.,

the relator, that [*state all the facts on which the relator relies for relief, as the writ must state a cause of action*].

Now therefore, we, being willing that full and speedy justice should be done in the premises, do command you that you [*state what acts are to be performed*], or that you appear before the supreme court, at the city of Lincoln, on the day of, 18..., at ... o'clock ... M., to show cause why you refuse to do so.

Witness S. M., chief justice of the supreme court, and the seal of said court hereto affixed, this day of, 18...

[L. S.]

A. B., Clerk.

The answer may consist of a general or specific denial, or of new matter constituting a defense.

The *peremptory writ* is the absolute mandate of the court, directing the performance of an official act on the part of the respondent. It must conform strictly to the alternative writ, and can award no other or different relief than that prayed for in the alternative writ. High on Ex. Rem., §§ 547, 548, and cases cited.

NO. 816.

Peremptory Writ of Mandamus After Trial or Default.

THE STATE OF NEBRASKA, COUNTY.

To [*name of the respondent*]:

Whereas, in an action pending in the [*name of court*], wherein was plaintiff and defendant, judgment was rendered by said court on the day of, 18..., that a peremptory writ of mandamus issue in said cause commanding you to [*state the duty required to be performed*].

Now therefore, we command you, immediately upon the receipt of this writ, to [*state the duty required to be performed*].

Witness S. M., chief justice of the supreme court, and the seal of said court hereto affixed this day of, 18...

[L. S.]

A. B., Clerk of the Supreme Court.

A rule to show cause may take the place of an alternative writ for the purpose of obtaining a peremptory writ. When the right is clear and it is apparent that there is no legal excuse for the failure to perform the act required, a peremptory writ may be awarded in the first instance. *People v. Throop*, 12 Wend., 183.

No. 817.

Order Allowing Peremptory Writ.

This cause came on for hearing upon the alternative writ of mandamus heretofore issued, and the return thereto and the evidence, and was submitted to the court, on consideration whereof the court finds the issues in favor of the * relator.

It is therefore considered by the court that a peremptory writ of mandamus issue against said [*respondent*], commanding him to [*state the duty to be performed*][†], and that he pay the costs of this action taxed at \$.....

No. 818.

Judgment for Defendant.

*Follow the preceding form to the *, then add: respondent.*

It is therefore considered by the court that this action be dismissed, and that the respondent go hence without day, and recover from the relator his costs herein expended taxed at \$.....

No. 819.

Judgment for Plaintiff and Imposing Fine for Neglect of Duty.

Follow form No. 817 to the †, then add: And it appearing to the court that the public duty which [*respondent*] is herein required to perform was specially enjoined upon him by law, and that without just excuse he refused [*or neglected*] to perform the duty so enjoined,

It is therefore considered by the court that said [*respondent*] pay a fine of [*not to exceed \$500*] for such refusal [*or neglect*], and that he pay the costs, etc.

CHAPTER XLVI.

PROCEEDINGS IN THE DISTRICT COURT TO VACATE OR MODIFY ITS OWN
JUDGMENTS.

The district court has power to vacate or modify its own judgments and orders after the term at which such judgment or order was made for the causes assigned in section 602 of the code.

The power thus conferred is only that of further proceedings for the causes enumerated in an action after judgment; and are merely special proceedings in an action, and not an original action. Taylor v. Fitch, 12 O. S., 172. Coates v. Chillicothe Bank, 23 Id., 431. Iler v. Darnell, 5 Neb., 192.

The power must be exercised within the limits prescribed by the statute, and be governed by fixed principles of law. *Smith v. Pinney, 2 Neb., 145.*

The court may direct the clerk to correct, not only clerical errors, but such errors as may arise from any fraudulent or improper alteration or mutilation of its files or records. Hollister v. The Judges, 8 O. S., 201.

A court may amend its record to correspond with the facts, and this may be done from the judge's notes, or any other satisfactory evidence. Id. Garrison v. The People, 6 Neb., 274.

The entire purpose of entering orders or judgments as of a prior date is to supply matters of evidence. Where it is clear that an order or judgment was in fact rendered, but through the inadvertence or negligence of the clerk was not entered upon the journal, the court has authority to order it to be supplied. *Id.*

A clerical error in the entry of a judgment may be corrected on motion at a subsequent term. Ohio v. Beam, 3 O. S., 508.

A petition to vacate an order or judgment under subdivisions 4, 5, 6, 7, 8, and 9, of section 602, can readily be framed from form No. 427, page 353. The petition must conform to the facts. The fifth, sixth, seventh, eighth, and ninth subdivisions seem to include errors in fact. And it is probable that the remedy thus given in such cases is exclusive, subject to review in the supreme court.

A summons must be issued on the petition and served as at the commencement of an action. If errors of fact are alleged in the petition an answer may be filed as in other cases. When the questions presented are purely questions of law, no answer would seem to be required.

No. 820.

Judgment Vacated on Petition.

This cause came on for hearing on the petition of the plaintiff for the vacation of the judgment heretofore rendered in this cause and the evidence, and was submitted to the court, on consideration whereof the court finds that the plaintiff herein* has a valid cause of action [*or defense*] and that he is entitled to have said judgment vacated and set aside.

It is therefore considered by the court that the judgment heretofore rendered in the case of A. B. v. C. D. be and the same hereby is set aside and vacated, and the said cause is continued for trial.

No. 821.

Judgment Affirmed.

Follow the preceding form to the *, then add: is not entitled to a reversal or vacation of said judgment.

It is therefore considered by the court that these proceedings be dismissed, and the defendant herein go hence without day, and recover his costs herein expended taxed at \$.....

No. 822.

Motion to Correct Mistakes or Omissions.

The plaintiff herein moves the court to correct a mistake of the clerk in entering the judgment in this case, as follows: [*judgment was rendered in favor of the plaintiff on the day of, 18..., for the sum of \$....., but the clerk by mistake entered the same as having been rendered in favor of the defendant*].

The plaintiff therefore asks to have said entry corrected to conform to the facts.¹

A. B.,

By S. J., *his Attorney.*

No. 823.

Notice of Motion.

To C. D.:

You are hereby notified that I will apply to the district court of county on the day of, 18..., or as soon

¹ Before the record is approved and signed by the judge the clerk may make the proper corrections in the journal entries.

thereafter as I can be heard, for an order to correct the entry of judgment made by the clerk in the case of A. B. v. C. D. in this, that whereas said judgment was actually rendered in favor of the plaintiff for the sum of \$..... and costs, the clerk by mistake has entered the same in favor of the defendant for said sum. The plaintiff will move at the time above stated for an order correcting said entry to conform to the facts by entering said judgment in favor of the plaintiff.

A. B.,
By S. J., *his Attorney.*

No. 824.

Judgment Correcting Mistake.

This cause came on for hearing on the motion of the plaintiff to correct the entry of judgment heretofore made in this case, and was submitted to the court, on consideration whereof the court finds that judgment was actually rendered in said cause in favor of the plaintiff for the sum of \$....., but that the clerk in entering up said judgment by mistake entered the same in favor of the defendant.

It is therefore considered and ordered that the entry of said judgment be corrected by entering the same in favor of the plaintiff for the sum of \$..... and costs of suit.

No. 825.

Injunction Allowed.

Application being made to the court for the vacation of the judgment heretofore rendered in this case, and it appearing probable that the plaintiff is entitled thereto,

It is ordered that the defendant be and he is enjoined from enforcing the collection of said judgment until the further order of the court. The plaintiff to execute an undertaking to the defendant in the sum of \$....., conditioned as required by law.

CHAPTER XLVII.

HABEAS CORPUS.

No. 826.

Petition for Writ of Habeas Corpus.

In the matter of the applica-
 tion of A. B. for a writ of
 habeas corpus. }

Your petitioner, A. B., respectfully represents to J. J., judge of the district court for the county of, that he is unlawfully deprived of his liberty by C. D., in county, in this state [*state the facts in regard to the detention*]. A copy of the commitment [*or cause of detention*] is hereto attached, marked "Ex. A."

Your petitioner therefore prays that a writ of habeas corpus may be issued, and that he may be discharged from said unlawful imprisonment.

A. B.

I, A. B., petitioner herein, do solemnly swear that the facts stated in the foregoing petition are true, as I believe.

A. B.

Subscribed, etc.

No. 827.

Order Allowing Writ.

Now on this day came A. B., by S. J., his attorney, and presented his petition, duly verified, praying for a writ of habeas corpus, and produced to me [*or the court*] a copy of the commitment [*or cause of detention*] by which said A. B. is deprived of his liberty, and it being made to appear that said A. B. is unlawfully detained,

It is therefore ordered that a writ of habeas corpus be allowed to issue in favor of said A. B., returnable on the day of, 18..., and be directed to C. D.

If the order is made by the judge of the district court, the writ will be issued by the clerk of the court.

No. 828.

Writ of Habeas Corpus.

THE STATE OF NEBRASKA, COUNTY.

To [*the person detaining the petitioner*]:

You are hereby commanded to have the body of A. B., by you unlawfully deprived of his liberty as is alleged, together with the cause of his detention, before J. J., judge of the district court [*or the court*], at the court house in, on the day of, 18... [*or forthwith*], then and there to be dealt with according to law, and have you then and there this writ.

Witness J. J., judge of the district court of county, and the seal of said court affixed hereto this day of, 18...

[L.S.]

K. L., *Clerk of the District Court.*

The court or judge, if it is considered necessary, will issue a subpoena to the sheriff of the county where the petitioner is confined, commanding him to summon such witnesses as may be required by either party, to appear at the time and place the writ is returnable.

The person detaining the petitioner should make a return to the writ in the form of an answer, showing the cause of the detention.

No. 829.

Return to Writ.

C. D., for answer and return to said writ, states that said A. B., on the day of, 18..., was placed in his custody by virtue of a warrant of commitment, of which the following is a copy [*copy commitment*], and that he now holds said A. B. in custody by virtue of said warrant. In obedience to the writ of habeas corpus issued herein he now produces the body of said A. B. before the court [*or judge*], to be dealt with according to law.

[*Signature of officer.*]

Date, etc.

No one should be discharged for a mere defect in the warrant of commitment, but a warrant in proper form should be issued.

The supreme court of Ohio hold that the proceeding is in its nature a civil proceeding, and must be reviewed by a petition in error. *Ex parte James Collier*, 6 O. S., 55.

Habeas corpus is not a proper proceeding to review a judgment of a court having jurisdiction, nor in such case will the court look beyond the judgment and re-examine the charges on which it was rendered. Ex parte Fisher, 6 Neb., 309.

In case of confinement, imprisonment, or detention by any person not a sheriff, deputy sheriff, coroner, jailer, constable, or marshal, or other like officer of the courts of the state or the United States, the writ of habeas corpus shall be in the form following:¹

No. 830.

THE STATE OF NEBRASKA, COUNTY, ss.

The People of the State of Nebraska to the Sheriff of said County, greeting:

We command you that the body of, of, by, of, imprisoned and restrained of his liberty, as it is said, you take and have before, a judge of our court, or in case of his absence or disability, before some other judge of the same court at forthwith, to do and receive what our said judge shall then and there consider concerning him in his behalf, and summon the said then and there to appear before our said judge to show the cause of the taking and detaining the said; and have you there this writ with your doings thereon.

Witness at, this day of, 18...

[SEAL.]

.....

The return may be in the same form as that on page 563.

No. 831.

Order Admitting to Bail.

Now on this day came and produced the body of A. B., petitioner herein, and also made return and answer to the writ of habeas corpus issued in the case, and after examining the warrant of commitment, and hearing the proofs, I find* that said petitioner is not unlawfully imprisoned; I also find that the offense for which he stands committed is bailable.

It is therefore ordered that said A. B. be permitted to enter into recognizance in the sum of \$....., with approved sureties,

¹ Gen. Stat., 807.

conditioned for his appearance at the next term of the district court of county, and to abide the order and judgment of the court and not depart therefrom without leave, and upon entering into such recognizance he be discharged from imprisonment.

No. 832.

Order Discharging Petitioner.

Follow the preceding form to the *, then add: that said A. B. is unlawfully deprived of his liberty by C. D.

It is therefore ordered that said A. B. be discharged from the custody of C. D. and from said unlawful detention.

No. 833.

Order Remanding Petitioner.

Follow form No. 831 to the *, then say: that said A. B. is not unlawfully restrained of his liberty.

It is therefore ordered that said A. B. be remanded back to the custody of said C. D., there to remain until otherwise legally discharged.

CHAPTER XLVIII.

REMOVAL OF CAUSES TO THE U. S. CIRCUIT COURT.

No. 834.

Petition for Removal Under the Act of March 3, 1875.

1. Your petitioner respectfully states to the court that the amount in dispute in the above entitled action, exclusive of costs, exceeds the sum or value of five hundred dollars.

2. The petitioner, who is [*defendant*] in said suit, at the commencement thereof, was and now is a citizen of the state of, and the [*plaintiff*] in said suit then was and now is a citizen of the state of [*If there are other plaintiffs or defendants state the citizenship of each.*]

3. Your petitioner herewith offers a bond with good and

sufficient surety conditioned as required by law for the removal of said cause, and desires to remove the same unto the circuit court of the United States for the district of, as provided by the act of Congress.

Your petitioner therefore prays the court to accept said bond and surety and order said cause removed into the circuit court of the United States for the district of

A. B.

By S. J., *his Attorney.*

Verification. Ante page 36.

No. 835.

Under the Act of March 2, 1867.

1 and 2. [*As in preceding form.*]

3. Your petitioner further represents that no trial or final hearing of said cause has been had, but said cause is now pending for trial in this court.

4. Your petitioner has made and filed in this court an affidavit stating therein that he has reason to believe that from prejudice [*or local influence*] he will not be able to obtain justice, etc. [*Prayer as in preceding form.*]

No. 836.

Affidavit of Prejudice.

I, A. B., do solemnly swear that I am [*plaintiff*] in the above entitled cause; that I have reason to believe and do believe that from prejudice [*or local influence*] I will not be able to obtain justice in this court.

A. B.

Subscribed, etc.

If the removal is sought on the ground that the cause of action is one arising under the constitution or laws of the United States, or treaties made under their authority, it is unnecessary to state the citizenship of the parties, but it is proper to do so.

No. 837.

When the Cause Arose Under the Constitution or Laws of the U. S.

1 and 2. [*As in No. 834.*]

3. Your petitioner further represents that said cause of ac-

¹ The plaintiff himself should make the affidavit. *Cooper v. Cordon*, 15 Kan., 572.

tion is one arising under the constitution [*or laws*] of the United States in this [*state the facts showing the right to have the cause removed*]. [*Continue as in No. 834.*]

No. 838.

By Corporation Organized Under the Laws of the U. S.

[*Allege corporate character.*]

1 and 2. [*As in No. 834.*]

3. Your petitioner has a defense to said suit arising under the laws of the United States. [*Continue as in No. 834.*]

The law does not seem to require a statement of the facts constituting the *defense*.

No. 839.

Bond for the Removal of Cause Under the Act of March 2, 1867.

Know all men by these presents that we, A. B. as principal and and as sureties, are held and firmly bound unto in the penal sum of \$....., for the payment of which well and truly to be made we hereby bind ourselves.

Dated this day of, 18...

Whereas, has filed his petition in the district court of county for the removal of a cause pending therein—wherein A. B. is plaintiff and C. D. defendant—to the circuit court of the United States for the district of*

Now therefore, the condition of this obligation is such that if said [*petitioner*] shall enter in such circuit court of the United States on the first day of its session copies of all process and of all pleadings, depositions, testimony, and other proceedings in the cause [*and in cases where a citizen of the state where suit is brought is defendant, if special bail was originally requisite*], and shall then and there appear and enter special bail in said cause, and shall perform all other acts required to be done upon the removal of said cause from this court to the United States circuit court, then this obligation to be null and void, otherwise to remain in full force and effect.

Witness our hands this day of, 18...

[*Signatures.*]

No. 840.

*Bond for Removal under the Act of March 3, 1875.*¹

Follow the preceding form to the *, then add: Now therefore, the condition of this obligation is such that if [*the petitioner*] shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and pay all costs which may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and [*if special bail was originally required*] shall appear and enter special bail in said suit, then this obligation to be null and void, otherwise to remain in full force and effect.

Witness, etc.

When a petition is filed to remove a cause on the ground that the plaintiff and defendant are citizens of different states, and the facts stated in the petition are denied by answer, the state court has authority to examine the grounds upon which it is sought to oust it of jurisdiction, and it is the proper tribunal to do so. *Blair v. West Point Mfg. Co.*, 7 Neb., 147.

And when the petition for the removal in connection with the pleadings fail to show that the cause is removable, it is not error for the court to deny the application. *Id.* The reason is that the circuit court is limited in jurisdiction, and the pleadings should show that the case is within its jurisdiction.

In cases arising under the constitution, laws, and treaties of the United States the subject matter gives the jurisdiction without regard to the citizenship of the parties.

When an application to remove a cause is in proper form, and the facts are such as to bring the case within the provisions of the law for the removal of causes, the district court should at once order the cause removed.

No. 841.

Order Removing Cause.

This cause came on for hearing upon the petition of the [*plaintiff*] for the removal of this cause to the circuit court of

¹ The present law for the removal of causes operates very unjustly upon litigants residing at a great distance from the place of trial. The law should be materially modified.

the United States and was submitted to the court, on consideration whereof the court finds that the defendant is a resident * of the state of..... and is entitled to such removal.

It is therefore ordered that said petition and bond be accepted and said cause removed for trial to said circuit court of the United States.

No. 842.

Order Denying Motion.

Follow the preceding form to the *, then say: of this state, and is not entitled to a removal of said cause to the circuit court of the United States for trial.

It is therefore ordered that said bond be refused and said petition denied.

CHAPTER XLIX.

RECORD.

All judgments and orders shall be entered on the journal of the court and specify clearly the relief granted or order made in the action.

The clerk shall make a complete record of every cause, unless the action has been dismissed without prejudice, as soon as it is determined, unless such record or some part thereof be duly waived.

He shall make up the record in such cases in the vacation next after the term at which the same was determined, and the presiding judge of such court shall, at its next term thereafter, subscribe to the same.¹

The records shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court. But if the

¹ The failure of the judge to sign the record will not prevent an execution from issuing or other proceedings taking place in the same manner as though the record had been approved and signed. G. S., page 255.

items of an account, or the copies of a paper attached to the pleadings be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. *Evidence must not be recorded.* Code, §§ 443-6.

No. 843.

Form of Complete Record.

A. B. }
v. }
C. D. }

Be it remembered that heretofore, to-wit, on the day of, 18..., A. B., plaintiff, filed his petition in the office of the clerk of the district court of county, Nebraska, against C. D., defendant, in the words and figures following, to-wit:

[*Copy petition.*]

and thereupon filed a precipe upon which a summons, of which the following is a copy, was duly issued:

[*Copy summons.*]

which summons, on the day of, 18..., was returned endorsed as follows: [*copy return*].

Afterwards, on the day of, 18..., the defendant C. D. filed an answer to said petition in the words and figures following, to-wit: [*copy answer*].

On the day of, 18..., A. B., plaintiff, filed a reply to said answer, of which the following is a copy: [*copy reply*].

Afterwards, on the day of, 18..., [*copy form No. 532*]. [*Copy all the journal entries in the case.*]

The clerk is required to keep at least eight books, to be called the appearance docket, the trial docket, the journal, the complete record, the execution docket, the fee book, the general index, and the judgment record.¹

On the *appearance docket* the clerk will enter all actions in the order in which they are brought, the date of the summons, the time of the return thereof by the officer, and his return thereon, the time of filing the petition, and all subsequent pleadings.

On the *general index* he is required to enter the names of the

¹ See *Metz v. The State Bank*, 7 Neb., 170-1.

parties to every suit, both direct and inverse, and the page and book where all proceedings in said action may be found.

The judgment record shall contain the names of the judgment debtor and judgment creditor arranged alphabetically, the date of the judgment, the amount of the same, and the amount of costs, and the page and book where the same may be found.

Transcripts of judgments from justices of the peace, or courts of probate, filed in the district court, shall be entered upon such record, and whenever a judgment is paid off and discharged, the clerk shall enter such fact upon the judgment record.

CHAPTER L.

EXCEPTIONS AND BILL OF EXCEPTIONS. TRANSCRIPT.

An *exception* is an objection taken to a decision of the court upon a matter of law.

The party objecting to the decision must except at the time the decision is made, and time may be given to reduce the exception to writing. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the rising of the court.¹

The object of a bill of exceptions is to bring into the record matter which otherwise would not be a part of it. When the entire proceedings have been entered at length on the journal of the court no bill of exceptions is necessary. *Morrow v. Sullender*, 4 Neb., 375.

No. 844.

Bill of Exceptions.

In the district court of county, Nebraska.

A. B. }
v } Bill of Exceptions.
C. D. }

Be it remembered that on the trial of this cause in the district

¹ As to the procedure in such case see *First National Bank v. Bartlett*, 8 Neb., 319.

court of county before R. S., judge of said court, at the, 18..., term thereof, to-wit: on the day of, 18..., the [*plaintiff*], to maintain the issue on his part, called A. B. as a witness, who, being sworn as required by law, testified as follows: [*copy the entire testimony if it is objected that the verdict or finding is against the evidence. If not, copy so much of the evidence offered, objected to, and excluded as is necessary to show that the evidence offered was pertinent and proper testimony*].¹

The plaintiff, further to maintain the issue on his part, offered in evidence a deed from C. D. to A. B., to which the defendant objected for the reason that it was not witnessed, which objection was sustained and said deed excluded, to which ruling of the court the plaintiff at the time excepted. Said deed is attached hereto marked "Ex. A.," and made a part of this bill of exceptions.²

The plaintiff thereupon offered to read in evidence the deposition of E. F., to which the defendant objected on the ground that the same had been taken in the state of Kansas before a clerk of the district court. The objection was sustained and said deposition excluded, to which the plaintiff at the time excepted. Said deposition is hereto attached, marked "Ex. B.," and made a part hereof.³

The plaintiff, further to maintain the issue on his part, called as a witness G. H., who, being duly sworn, was asked the following question: "State if you remember what was contained in a certain written contract executed by the plaintiff and defendant on or about the day of, 18..., whereby the defendant sold to the plaintiff bushels of wheat?" to which question the defendant objected for the reason that it had not been shown that the original contract was lost, which objection was sustained, to which the plaintiff excepted.

The plaintiff then offered to prove the contents of said contract as follows: [*state what was offered*], to which the defendant objected as not the best evidence, which objection was sustained by the court, to which the plaintiff excepted.

¹ Usually the better course is to copy the entire testimony.

² Evidence offered and excluded must be preserved in the bill of exceptions.

³ See *Starring v. Mason*, 4 Neb., 367.

The plaintiff thereupon rested.

The defendant, to maintain the issue on his part, called as a witness I. J., who, being duly sworn, testified as follows: [*set out the testimony of each witness with the exceptions*].

Thereupon the defendant rested.

The plaintiff thereupon called as a witness K. L., who, being duly sworn, testified as follows, etc.

The plaintiff thereupon rested.¹

The foregoing is all the evidence offered or given by either party on the trial of the cause, and on application of the [*defendant*] this bill of exceptions is allowed by me and ordered to be made a part of the record in this case.²

R. S. J., *Judge*.

Dated, 18...

No. 845.

Transcript.

THE STATE OF NEBRASKA, COUNTY.

Pleas before the district court of county, Nebraska, at a term begun and holden in the county of on the day of, 18..., before R. S., judge of said district court.

A. B. }
v.
C. D. }

Be it remembered that heretofore, to-wit: on the day of, 18..., a petition was filed in the office of the clerk of the district court of county in the words and figures following, to-wit:

¹ It is unnecessary in this state to include the instructions in the bill of exceptions, as the statute makes them a part of the record, and they may be certified by the clerk. Laws of 1875, page 77. It is not uncommon to find the instructions set out in bills of exceptions and also certified as a part of the transcript. This should be avoided, as it adds needless expense, which should be taxed to the party at fault.

² It is unnecessary, in the certificate of the judge, to notice the procedure in settling the bill. The draft of the bill must contain all the exceptions taken upon which the party relies. This must be submitted to the adverse party within the time limited by the court, not exceeding forty days from the rising of the court. The adverse party may then propose amendments thereto, and within ten days must return the bill with the proposed amendments to the other party or his attorney of record. The bill and proposed amendments must within ten days thereafter be presented by the party seeking the settlement of the bill to the judge who heard or tried the cause, upon *five days'* notice to the adverse party or his attorney of record, at which time the judge shall settle the bill of exceptions.

[*Copy the petition.*]¹

If the cause came from another court on change of venue the facts may be stated. See *ante* page 38.

And afterwards, on the day of, 18..., there was filed in the office of said clerk an answer in the words and figures following, to-wit:

[*Copy the answer in full.*]

And afterwards, on the day of, 18..., the plaintiff filed a demurrer to the answer of the defendant in the words and figures following, to-wit:

[*Copy demurrer.*]²

And now, on this day of, 18..., it being the day of said term, this cause came on for hearing on the plaintiff's demurrer to the answer of the defendant and [*copy journal entry*; see *ante* pages 99, 100].

And afterwards, on the day of, 18..., the plaintiff filed his reply in the words and figures following, to-wit:

[*Copy reply.*] [*If a continuance was granted set out the facts.*]

And now, on this day of, 18..., it being the day of said term, this cause coming on for trial, came a jury, to-wit: [*names of jurors*], twelve good and lawful men, who were duly sworn according to law, who, after hearing the evidence and the arguments of counsel, were instructed by the court as follows: [*set out each instruction given in the form given*], to the giving of the third, fifth, and sixth paragraphs thereof, and to each of said paragraphs the [*defendant*] then and there duly excepted. The defendant then asked the court to instruct the jury as follows, to-wit: [*copy instructions asked*], each of which the court refused to give, to which refusal to give each of said instructions the defendant then and there excepted. The jury then retired in charge of the [*sheriff*], to consider their verdict,

¹ If an *amended petition* has been filed and no objection is made on that ground, copy only the *amended petition*. And if there has been an *appearance* and no point is made on the summons it *should not be copied* into the record. So with other papers which are *not to be considered* in the appellate court, they should be omitted, as they merely cumber the record and entail needless expense.

² If no objection is made to the ruling on the demurrer it may be omitted from the transcript.

and on the day of, 18..., returned into open court the following verdict:

[*Copy verdict.*]

Afterwards, on the day of, 18..., the [*defendant*] filed a motion for a new trial in the words and figures following, to-wit:

[*Copy motion for new trial.*]

And afterwards, to-wit: on the day of, 18..., this cause came on for hearing on the motion for a new trial, and was submitted to the court, on consideration whereof the court doth overrule the same, to which the defendant excepted.

It is therefore considered by the court that the plaintiff recover from the defendant the sum of \$....., his damages so as aforesaid sustained, and his costs herein expended taxed at \$.....

And afterwards, on the day of, 18..., the defendant filed in said court his bill of exceptions, in the words and figures following, to-wit:

[*Copy bill of exceptions.*]

No. 846.

Certificate of Clerk.

THE STATE OF NEBRASKA, COUNTY.

I, A. B., clerk of the district court of county, do hereby certify that the foregoing is a true and perfect transcript of the record in the above entitled cause [*if the entire record has not been taken up designate each part thus: the petition, answer, reply, instructions, etc.*], as the same is on file and of record in my office.

[*Signature.*]

Dated, 18...

No. 847.

Mandate.

THE STATE OF NEBRASKA, COUNTY.

To [*name of court*].

Whereas, in an action pending before you, wherein A. B. was plaintiff and C. D. defendant, judgment was rendered by you on the day of, 18..., in favor of the plaintiff for the sum of \$....., and \$..... costs of suit; and whereas said defendant thereupon prosecuted a petition in error upon said judgment and a transcript of the proceedings in said cause to the

[*name of appellate*] court, which judgment was by said court * affirmed on the day of, 18..., with costs taxed at \$.....

You are therefore commanded immediately to cause execution to be issued on said judgment of court for the sum of \$..... and costs, returnable as required by law.

Witness J. J., judge of the court of county, and the seal of said court affixed hereto, this day of, 18...

[L.S.]

....., *Clerk, etc.*

No. 848.

Procedendo.

Follow the preceding form to the *, then add: reversed on the day of, 18...; [*with costs taxed at \$.....*], and said cause remanded to the court for further proceedings.

You are therefore commanded without unnecessary delay to proceed as required by law to final judgment in said cause between said parties.

Witness, etc.

CHAPTER LI.

PROCEDURE IN THE SUPREME COURT.

Proceedings in error must be commenced within one year from the time of the rendition of the judgment complained of except as to persons under disability.¹ Laws of 1875, page 14.

A petition in error must be filed before the summons in error is issued. *The City of Brownville v. Middleton*, 1 Neb., 10.

In actions in equity either party may appeal from the judgment or decree rendered or final order made by the district court to the supreme court. The party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making the final order, procure from the clerk of

¹ The plaintiff in error, upon filing his petition in error and transcript, should order a summons in error to issue unless the adverse party has waived the same in writing.

the district court and file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause in the district court, containing the pleadings, the judgment, or decree rendered or final order made therein, and all the depositions, testimony, and proofs offered in evidence on the hearing of the cause,¹ and have the same properly docketed in the supreme court; and in failure thereof the judgment or decree rendered, or the final order made in the district court, shall stand and be proceeded in as if no appeal had been taken. Gen. Stat., 716.

The supreme court has no authority to enlarge the time within which a transcript may be filed. *Verges v. Rousch*, 1 Neb., 114. *Nuckolls v. Irwin*, 2 Id., 65.

Computation of time. The rule is to exclude the first day, then count the full number of months or days to be computed. *Glore v. Hare*, 4 Neb., 132.

An action at law can be reviewed only on error; therefore, if no exceptions have been taken to the ruling of the court below the case cannot be reviewed, as the power of the court is limited to the questions presented by the record. *Robertson v. Hall*, 2 Neb., 19. *Roode v. Dunbar*, 9 Id., 95.

What may be reviewed. A judgment rendered or final order made by the district court.

An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment.

A judgment rendered or final order made by the tribunals mentioned in section 580, but the petition in error in such case can be filed only by leave of the supreme court or a judge thereof.

The proceedings to obtain such reversal, vacation, or modification, shall be by petition, to be entitled "petition in error," filed in the court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and

¹ When the finding of the district court upon the facts is not objected to, the only error complained of being one of law, the testimony need not be preserved. *Rogers v. Hotel Co.*, 4 Neb., 54.

thereupon a summons shall issue and be served as in the commencement of an action.

No. 849.

Petition in Error.

In the Supreme Court of Nebraska.

C. D., plaintiff,	} Petition in Error.
v.	
A. B., defendant.	

The plaintiff complains of the defendant for that on the day of, 18..., the defendant herein recovered a judgment against the plaintiff herein in the district court of county, for the sum of \$....., and \$..... costs of suit, in an action pending in said court, wherein the defendant herein was plaintiff and the plaintiff herein defendant. A transcript of the proceedings containing said final judgment is filed herewith.

The plaintiff alleges that there is error in said proceedings and judgment in this:

1. The court erred in excluding from the jury the chattel mortgage from the plaintiff to the defendant marked "Ex. A" in the transcript.

2. The court erred in admitting in evidence [*point out the evidence objected to*].

3. The court erred in giving paragraph No. 4 of the instructions given by the court on its own motion.

4. The court erred in refusing to give paragraph No. 1 of the instructions asked by the defendant.

5. The court erred in overruling the motion for a new trial.

The plaintiff therefore prays that said judgment may be reversed, and a new trial granted in said cause, and for such other relief as justice may require.

C. D.,

By S. H., *his Attorney.*

No proceedings to reverse, vacate, or modify any judgment or final order rendered in the probate court or district court, except as provided in section 589, and the fourth subdivision of section 588, shall operate to stay execution, unless the clerk of the court in which the record of said judgment or final order shall be, shall take a written undertaking to be executed on the

part of the plaintiff in error to the adverse party, with one or more sufficient sureties, etc.

No. 850.

Undertaking to be Filed in District Court on Judgment for Money.

Whereas, on the day of, 18..., C. D. has filed in the supreme court his transcript and petition in error to obtain the reversal of a judgment rendered in the district court of county, on the day of, 18..., in favor of A. B. and against C. D.,* for the sum of \$....., and for costs of suit in an action pending therein wherein said A. B. was plaintiff and C. D. defendant.

Now therefore, we, C. D.¹ as principal and E. F. and G. H. as sureties, do hereby undertake to said A. B. in the sum of \$..... [*double the amount of the judgment*], that said C. D. will pay the condemnation money and costs in case said judgment [*or final order*] shall be affirmed in whole or in part.

C. D.

E. F.

G. H.

I hereby approve of the execution of the above undertaking, and the sufficiency of the sureties thereon, this day of, 18...

K. L., *Clerk of the District Court.*

No. 851.

Undertaking where the Judgment Directs the Execution of a Conveyance.

Follow the preceding form to the *, then say: that C. D. execute and deliver to said A. B. a conveyance for certain [*lands*] set forth in said judgment, and said court having prescribed the sum of \$..., as the amount of the undertaking to obtain a review of said judgment and proceedings in the supreme court;

Now therefore, we, C. D. as principal and E. F. and G. H. as sureties, do hereby undertake to said A. B., in the sum of \$..., that said C. D. will abide the judgment, if the same shall be affirmed, and pay the costs.

¹ See *Gregory v. Cameron*, 7 Neb., 414.

No. 852.

Undertaking in Actions concerning Real Estate.

Follow form No. 850 to the *, then say: for the possession of the following described real estate, to-wit: [*describe as in judgment*]; and said court having prescribed the sum of \$... as the amount of the undertaking, to obtain a review of said judgment and proceedings in the supreme court;

Now therefore, we, C. D. as principal and E. F. and G. H. as sureties, do hereby undertake to said A. B., in the sum of \$..., that during the possession of said real estate by said C. D., he will not commit, or suffer to be committed, any waste thereon; and if the judgment be affirmed, he will pay the value of the use and occupation of said premises until the delivery of the possession, pursuant to the judgment, and all costs.

No. 853.

Bond for an Appeal in Actions in Equity. To be Filed in Twenty Days from Date of Decree.¹

Know all men by these presents, that we, A. B. as principal and E. F. as surety, are held and firmly bound unto C. D., in the penal sum of \$....., for the payment of which, well and truly to be made, we hereby bind ourselves.

Dated this day of, 18....

Whereas, on the day of, 18...., a decree was rendered in the district court of county, in favor of C. D. and against A. B. for [*state substance of the decree*], in an action pending therein, wherein A. B. was plaintiff and C. D. defendant; and said A. B. intends to appeal said cause to the supreme court.

Now therefore, the condition of this obligation is such that if said A. B. shall prosecute such appeal without delay, and pay all condemnation money and costs which may be found against him on the final determination of the cause in the supreme court, then this obligation to be null and void, otherwise to remain in full force and effect.²

¹ G. S. 716.

² State the conditions under the second and third subdivisions of sec. 3 substantially in the language of the statute.

Actions in equity may be reviewed on error or appeal. An appeal brings upon the whole case, and it is heard *de novo*.

When the case is reviewed on error, only the errors assigned in the motion for a new trial can be considered, in cases where such motion is necessary, unless the alleged errors occurred after the trial, as on the confirmation of a sale of real property.

ORDER OF BUSINESS.

All causes from the same judicial district are required to be placed together on the docket, in the numerical order of the judicial districts, commencing with the first. And they are taken up and heard in their order, allowing one week for the hearing of causes from each district.¹

Any cause may, however, be submitted, on behalf of either or both of the parties, at any time, upon filing briefs of the points relied on, whatever may be its place on the docket.²

Whenever a cause is reached in the regular order on the trial of causes, and neither party appears in person or by attorney, the cause will be marked "Submitted."³

Whenever a cause is regularly reached, and the plaintiff [*appellant*] fails to appear—that is, has failed to prepare and serve briefs of the points relied on by him, or to appear and state a satisfactory reason for his failure—the defendant may have the cause dismissed, or may submit it with or without argument.⁴

When the defendant makes default, and there is due proof of service of notice and briefs upon him or his attorney, as required by the rules, the plaintiff may proceed *ex parte*.

The plaintiff in error, or appellant, is required, at least fifteen days prior to the week in which his case is entered for hearing, to furnish to the opposite party, or his attorney of record, a printed copy of his brief of points and authorities relied on, and within ten days thereafter the defendant in error, or appellee, shall furnish the plaintiff in error, or appellant, as the case may be, a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the case, file with the clerk of the court six copies of said briefs, one for each

¹ Rule No. 2.

² Id.

³ Rule 3.

⁴ Id. 4.

judge of the court, and the others for the reporter, and the party seeking a review of the judgment shall hold the affirmative.¹

The transcript of all records filed in any cause shall be written with marginal references to each paper or order composing the record.²

Usually motions are heard immediately after court convenes each morning.

In case a record is defective, diminution may be suggested, and a perfect transcript ordered. See *ante* page 553.

In the oral argument of a cause, the time accorded the parties on each side shall not exceed two hours, unless for special reasons the court shall extend the time.³

In regard to reading authorities on the argument, the late Chief Justice Gantt made the following suggestions, which I commend: Obtain as many authorities as possible to sustain each point in the brief, and refer to them therein; then *read a leading case upon each point*, and say that the authorities cited under that head sustain the case read. The court will then examine the authorities read and cited.

The regular public sessions of the court for the argument of causes open each day of the term at 8:30 A.M., and an adjournment is had at 1 P.M., unless for special reasons the court from time to time otherwise order.

The remainder of each day is devoted to the examination of causes submitted.

A motion for a re-hearing may be filed as of course at any time within thirty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a printed brief of the argument of counsel and the authorities cited in its support. If, upon examination, the court shall think such argument worthy of an answer, it will so indicate, fixing a time for the hearing of the motion, of which due notice in writing shall be served upon the adverse parties or their attorneys of record, by the party making the motion. Copies of briefs shall also be served as in other cases so far as is practicable.⁴

¹ Rule 6.

² Id. 9.

³ Id. 6.

⁴ Id. 16.

No. 854.

Motion for a Re-hearing.

In the supreme court.

C. D., Plaintiff, }
 v. }
 A. B., Defendant. }

The defendant moves the court for a re-hearing in this cause for the following reasons :

1st. The testimony of E. F., page transcript, establishes the following facts: [*state what facts are claimed to be established*], which are not referred to in the opinion of the court.

2d. The defendant claims that the law of the case is as follows: [*state the view of the law taken*], and is supported by the authorities cited, page in the printed brief of the argument accompanying this motion.

3d. [*State any other cause.*]

C. D.,
 By S. H., *his Attorney.*

As the judges in preparing opinions usually state the facts, a mistake in regard to the facts can readily be corrected.

The parties by a written stipulation may take up the original bill of exceptions, instead of copying the same, if they see fit.

A copy of the rules may be obtained from the clerk free of expense.

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